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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 96-4073

UTE INDIAN TRIBE of the Uintah and Ouray Reservation, Utah,
Plaintiff/Appellee,

v.

STATE OF UTAH; DUCHESNE COUNTY, a political subdivision of the State of Utah; UINTAH COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; and DUCHESNE CITY, a municipal corporation,
Defendants/Appellants,

UNITED STATES OF AMERICA,
Amicus Curiae.

MOTION TO RECALL MANDATE AND REQUEST FOR SUSPENSION OF RULES

MOTION TO RECALL MANDATE

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Appellants State of Utah, Duchesne and Uintah Counties, and the Cities of Roosevelt and Duchesne, hereby move to recall the mandate issued on December 5, 1986, subsequent to the *en banc* decision of this Court in *Ute Indian Tribe v. State of Utah, et al.*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S.

994 (1986),[1] and to remand the case to the United States District Court for the District of Utah with instructions to give full force and effect to the decision of the United States Supreme Court in the case of *Hagen v. Utah*, 510 U.S. ——, 114 S.Ct. 958 (1994). The *Hagen* decision directly conflicts with the *en banc* decision of this Court. Grounds for this Motion are as follows:

1. This case is one of a long series of related State and Federal suits dealing with the present extent of the reservation and jurisdiction of the Ute Indian Tribe. In 1993, the United States Supreme Court granted *certiorari* for the specific purpose of resolving a conflict between the *en banc* decision of this Court in *Ute Indian Tribe, supra,* and a decision of the Utah Supreme Court in *State of Utah v. Perank*, 858 P.2d 927 (Utah 1992). Writing for a seven-justice majority of the United States Supreme Court, Justice O'Connor stated:

> We granted certiorari, 507 U.S. 1028 (1993), to resolve the direct conflict between these decisions of the Tenth Circuit and the Utah Supreme Court on the question whether the Uintah reservation has been diminished.

2. In the *Hagen v. Utah* decision, the United States Supreme Court affirmed the decision of the Utah Supreme Court and held that the Uintah Valley Reservation had been diminished when unallotted land therein was "restored to the public domain" and opened for non-Indian settlement by Congress.

3. Thereafter, in renewed proceedings brought by the Tribe in the present case before the United States District Court for the District of Utah, the District Court considered itself bound by the mandate issued by this Court

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[1] In a letter written to the Clerk of the United States District Court for the District of Utah by the Clerk of the United States Court of Appeals for the Tenth Circuit dated December 5, 1986, the opinion of the Court of Appeals was deemed to constitute the mandate.

following its 1985 *en banc* decision and unable to give full effect to the later *Hagen v. Utah* decision. In a Memorandum Decision and Order entered on April 2, 1996, the District Court discussed the possibility of a motion to recall this Court's mandate (pp. 79-81) because of the significant change made in the controlling law by *Hagen v. Utah*. And, because no party had theretofore filed a motion to recall this Court's mandate, the District Court *sua sponte*, on April 22, 1996, prepared and filed with this Court a Certificate and Request for Further Instructions concerning the conduct of further proceedings in the case. On page 4 of its Certification and Request, the District Court invited this Court to recall its mandate.

4. By this Motion, Appellants agree that this Court should recall and reconsider its mandate in light of *Hagen*.[2] Movants are caught between the jurisdiction-expanding mandate of the United States Supreme Court in *Hagen v. Utah* and the inconsistent, jurisdiction-narrowing decision of the U.S. District Court. The District Court's further review of the matter has delayed by more than two years full implementation of the mandate of the United States Supreme Court restoring State civil and criminal jurisdiction over land held to no longer be part of the Uintah Valley Reservation.

5. This Court recently discussed the impact of the *Hagen v. Utah* decision of the Supreme Court on the holding in this case. In *United States of America v. Cuch*, 79 F.3d 987 (10th Cir. 1996), the Court stated that:

> The *Hagen* decision effectively overruled the contrary conclusion reached in the *Ute Indian Tribe* case, redefined the Reservation boundaries resulting from

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[2] We would further suggest that the simplest solution to this problem would be for the Court to reinstate the original three-judge panel decision in *Ute Indian Tribe v. State of Utah, et al.*, 716 F.2d 1298 (10th Cir. 1983), which we believe is fully consistent with the decision of the United States Supreme Court in *Hagen* and subsequent decisions of this Court.

our earlier decision, and conclusively settled the question.

Further, as noted in the *Hagen v. Utah* decision, the correctness of this Court's earlier decision in this case was also called into question by a panel of this Court in *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400 (10th Cir. 1990).

REQUEST FOR SUSPENSION OF RULES

Pursuant to Rule 2 of the Federal Rules of Appellate Procedure, and to avoid repetitive and unnecessary briefing, Movants request that this Motion be consolidated with and considered in connection with the other matters which are before the Court in this case, including the District Court's Certificate and Request for Further Instructions and Movants' appeal of the District Court's Order granting injunctive relief. The same issues are before the Court in three different contexts, and the interests of judicial economy will be served by directing that all three be briefed and considered together. Pursuant to an Order entered by the Court, this case will be considered on an expedited basis, with arguments to be heard during the September 1996 Session.

Respectfully submitted this 12th day of June, 1996.

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 96-4073

UTE INDIAN TRIBE of the Uintah and Ouray Reservation, Utah,
Plaintiff/Appellee,

v.

STATE OF UTAH; DUCHESNE COUNTY, a political subdivision of the State of Utah; UINTAH COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; and DUCHESNE CITY, a municipal corporation,
Defendants/Appellants,

UNITED STATES OF AMERICA,
Amicus Curiae.

SUGGESTION FOR CONSIDERATION *EN BANC*

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, Appellants State of Utah, Duchesne and Uintah Counties, and the Cities of Roosevelt and Duchesne, respectfully suggest that the matters before the Court in connection with this case [1] be considered *en banc*. The grounds for this suggestion are as follows:

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[1] As of now, the matters before the Court are the District Court's Certification and Request for Instructions and the Appeal pursuant to 28 U.S.C. § 1292(a). However, within the next few days Appellants will also be filing a Motion to Recall the Mandate of this Court issued on or about December 5, 1986.

1. Counsel for Appellants express a belief based on a reasoned and studied professional judgment that the *en banc* decision of this Court in *Ute Indian Tribe v. State of Utah, et al.*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986), is contrary to the subsequent decision of the United States Supreme Court in *Hagen v. Utah*, 510 U.S. ——, 114 S.Ct. 958 (1994), and has been effectively overruled by that decision. Further, the 1986 *en banc* decision of this Court in *Ute Indian Tribe* is now inconsistent with subsequent panel decisions of this Court (*see, e.g., Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990); *Gardner v. U.S.*, Case No. 93-4102, unpublished opinion dated May 5, 1994 at 5, n.4; and *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), and consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court.

This Appeal and the Certification and Request for Instructions by the District Court are the latest incarnations of a cases filed by the Ute Indian Tribe in 1975 in an effort to re-establish tribal jurisdiction over all lands located within the original exterior boundaries of the Uintah and Uncompahgre Reservations. The controversy over whether the original exterior reservation boundaries survived the opening of the respective reservations has bounced between various state and federal courts for years with inconsistent outcomes. In 1993, the United States Supreme Court granted *certiorari* to resolve the conflicting decisions (507 U.S. 1028).

The recent decision of the U.S. District Court, in failing to give full effect to the Supreme Court's decision in *Hagen*, has continued the turmoil, polarization and uncertainty on the part of Indian and non-Indian residents of the area, as well as State and Federal law enforcement officers and lower State and Federal Courts.

An authoritative *en banc* decision of this Court giving effect to the United States Supreme Court's decision in *Hagen v. Utah, supra,* is needed so that Indian and non-Indian residents of the area will finally know where they stand.

2. In its decision of April 2, 1996, the United States District Court for the District of Utah feels bound by the mandate issued following the 1985 *en banc Ute Indian Tribe* decision of this Court notwithstanding the subsequent decision of the Supreme Court in *Hagen.* It has prepared and filed with this Court a Certificate and Request for Further Instructions in which it invited this Court to recall its mandate. It seems logical to Appellants that the question of recalling the mandate issued following an *en banc* decision should be considered by the Court *en banc.* While awaiting a decision of this Court, the District Court issued a broad injunction which includes, among other things, language prohibiting State prosecution of misdemeanor cases involving members of the Ute Indian Tribe or members of other federally-recognized Indian tribes in the disputed area. This injunction flies in the face of the *Hagen* decision and is preventing full implementation of that decision and the mandate issued by the United States Supreme Court. It is from this broad injunction that Appellants have filed their appeal. The injunction issued by the District Court has also created an unseemly conflict between the State and Federal judicial systems which we believe was the very reason the United States Supreme Court granted *certiorari.*[2]

3. Counsel for Appellants here express a belief based on a reasoned and studied professional judgment that this appeal and related matters now before this Court involve the following questions of exceptional importance:

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[2] Even the United States, through the Solicitor General, urged the Supreme Court to grant *certiorari* to put to rest the continuing conflict.

a. Whether this Court's *en banc* opinion and mandate in *Ute Indian Tribe v. State of Utah,* 773 F.2d 1087 (1985), *cert. denied,* 479 U.S. 994 (1986), are to be given continued effect in light of the decision of the United States Supreme Court in *Hagen v. Utah,* 510 U.S. ——, 114 S.Ct. 958 (1994), and subsequent panel decisions of this Court (*Pittsburg & Midway Coal Mining Co. v. Yazzie,* 909 F.2d 1387 (10th Cir. 1990), *cert. denied,* 498 U.S. 1012 (1990); *Gardner v. U.S.,* Case No. 93-4102, unpublished opinion dated May 5, 1994 at 5, n.4; and *United States v. Cuch,* 79 F.3d 987 (10th Cir. 1996). The U.S. District Court for Utah has failed to do so, thereby frustrating the implementation of the mandate of the United States Supreme Court in *Hagen.*

b. The extent to which the original boundary of the Uintah Valley Reservation was diminished, which occurred as a result of Congress' restoring the unallotted lands thereof to the public domain and opening them for homesteading.

c. In the aftermath of *Hagen v. Utah,* what is the jurisdictional status of all lands not currently held in trust by the United States for the benefit of the Ute Indian Tribe or its members, within the original Uintah and Uncompahgre Reservations?

d. The jurisdictional status of the approximately 1.1 million acres of land within the original reservation boundaries which Congress restored to the public domain and were then added to the Ashley National Forest by Executive Order in 1905.

e. In light of the rationale announced by the United States Supreme Court in *Utah v. Hagen, supra,* whether the original Uncompahgre Reservation boundaries remain intact, when the lands within that Reservation (with the exception of a few minor allotments) were restored to the public domain and opened to homesteading.

f. Whether certain allotments which were originally part of the Uintah Valley Reservation at the time of its opening in 1905, but which have subsequently passed into non-Indian ownership and are no longer held in trust by the United States, are still "Indian country."

Respectfully submitted this 12th day of June, 1996.

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Court of Appeals Case No. 96-4073
District Court No. C 75-408J

No. 96-4073

UTE INDIAN TRIBE of the Uintah and Ouray Reservation, Utah,
Plaintiff/Appellee,

v.

STATE OF UTAH; DUCHESNE COUNTY, a political subdivision of the State of Utah; UINTAH COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; and DUCHESNE CITY, a municipal corporation,
Defendants/Appellants,

UNITED STATES OF AMERICA,
Amicus Curiae.

(Oral Argument Requested)

On Appeal from the United States District Court
for the District of Utah,
Honorable Bruce S. Jenkins, Senior Judge

BRIEF OF APPELLANT STATE OF UTAH

STATEMENT OF JURISDICTION

1. *District Court Subject Matter Jurisdiction.*

This is an action brought by an Indian tribe in which the matter in controversy arises under the laws of the United States. The District Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1362.

2. *Appellate Jurisdiction.*

This appeal is brought pursuant to 28 U.S.C. § 1292 (a)(1) from the April 2, 1996 Memorandum Decision and Order of the United States District Court for the District of Utah, Central Division, continuing in effect, as modified, the District Court's Order dated September 3, 1992 enjoining the State of Utah and its political subdivisions from the exercise of civil and non-felony criminal jurisdiction over Indians within the former boundaries of the Uintah and Ouray Indian Reservation, as those boundaries were set by the U.S. Court of Appeals for the Tenth Circuit in *Ute Indian Tribe v. State of Utah,* 773 F.2d 1087 (10th Cir. 1985) (*en banc*), cert. den. 479 U.S. 994 (1986) ("*Ute Indian Tribe*").

28 U.S.C. § 1292(a) provides in relevant part that the courts of appeal shall have jurisdiction of appeals from "[i]nterlocutory orders of district courts of the United States . . . continuing, modifying . . . or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." See *Casey v. Planned Parenthood,* 14 F. 3d 848, 854-855 (3rd Cir. 1994).

This appeal was brought by defendants State of Utah; Duchesne County, Utah; Uintah County, Utah; Roosevelt City; and Duchesne City (collectively the "Appellants" or the "State and Local Defendants"). Appellants' Notice of Appeal was timely filed with the District Court on April 12, 1996.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court commit error by continuing to enjoin the State of Utah and its political subdivisions from exercising jurisdiction anywhere within the former boundaries of the Uintah and Ouray Reservation, after the decision of the U.S. Supreme Court in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L. Ed. 2d 252 (1994) ("*Hagen*") that the reservation had been diminished by Congress?

2. After *Hagen* became final, what, if any, was the preclusive effect of this Court's mandate and opinion in *Ute Indian Tribe?*

3. Should this Court recall its mandate to the District Court in *Ute Indian Tribe*, and issue a new mandate to the District Court fully consistent with *Hagen* and other intervening law?

4. Did the District Court commit error in concluding that the only effect of *Hagen* within the Uintah Reservation was to remove from Indian country "on allotted and unreserved lands of the Uintah Reservation that were opened to entry in 1905, to the extent that those lands were not later restored to tribal ownership"?

STATEMENT OF THE CASE

1. *Nature of the Case.*

This appeal is taken pursuant to 28 U.S.C. § 1292 (a)(1) from the April 2, 1996 Memorandum Decision and Order (the "Memorandum Decision") of the United States District Court for the District of Utah, Hon. Bruce S. Jenkins District Judge, continuing in effect, as modified, his Order dated September 3, 1992 (the "Injunction Order"), enjoining the State of Utah and its political subdivisions from the exercise of civil and non-felony criminal jurisdiction over Indians within the former boundaries of the Uintah and Ouray Indian Reservation, as

those boundaries were set by the U.S. Court of Appeals for the Tenth Circuit in *Ute Indian Tribe*. Aplt. App. Tab G, p. 265. Concurrently with this appeal, appellants have moved the Court of Appeals pursuant to Rule 27, Fed. R. App. P. for an Order recalling the mandate in *Ute Indian Tribe*, and issuing a new mandate fully consistent with *Hagen*.

2. *Course of Proceedings.*

This action was originally commenced in 1975 by plaintiff Ute Indian Tribe (the "Ute Tribe" or the "Tribe") "seeking declaratory and injunctive relief establishing the exterior boundaries of the Uintah and Ouray Reservation, defining the force and effect of the Tribe's Law and Order Code within those boundaries, and restraining the defendants from interfering with the enforcement of that Code." *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1075 (D. Utah 1981). The District Court, Jenkins, J., ruled that the former Uintah Reservation had not been diminished by Congress at the time the reservation was legislatively opened to non-Indian settlement in 1905, and that all lands within the current reservation boundaries constituted Indian country pursuant to 18 U.S.C. § 1151(a). Id., 521 F. Supp. at 1153-1154. However, the District Court held that approximately 1,010,000 acres of land within the original reservation boundaries that had been added to the Uintah Forest Reserve (now the Uinta and Ashley National Forests) at the time of the 1905 opening had been removed from the reservation. Id. The District Court also ruled that the related Uncompahgre Reservation had been disestablished by Congress in 1897 and no longer existed in any form. Id.

On appeal by the Tribe, the majority of a three judge panel of the United States Court of Appeals for the Tenth Circuit affirmed Judge Jenkins' ruling that the national forest lands had been removed from the Uintah Reservation and the Uncompahgre Reservation disestablished, but

reversed his decision concerning the main body of the Uintah Reservation, and held that that reservation had been diminished for jurisdictional purposes. *Ute Indian Tribe v. State of Utah,* 716 F. 2d 1298 (10th Cir. 1983). On rehearing *en banc,* the Court of Appeals changed course and ruled in favor of the Tribe on all three issues, finding the Uncompahgre reservation still extant, and the Uintah Reservation intact with the national forest lands within its current boundaries. *Ute Indian Tribe, supra,* 773 F. 2d 1087.

In 1992, the Utah Supreme Court ruled in two related criminal cases that the original boundaries of the Uintah Reservation had been diminished when Congress opened the reservation to non-Indian settlement in the early 1900s. *State v. Hagen,* 858 P.2d 925 (Utah 1992) ("*State v. Hagen*"); *State v. Perank,* 858 P.2d 927 (Utah 1992) ("*Perank*"). As a consequence, the Court held that the State had properly asserted criminal jurisdiction over the Indian defendants because the loci of their crimes, although within the original exterior boundaries of the reservation, were outside "Indian country" as defined in 18 U.S.C. § 1151.

The United States Supreme Court granted a writ of certiorari "to resolve the direct conflict" between the decisions of the Tenth Circuit in *Ute Indian Tribe* and of the Utah Supreme Court in *Hagen* and *Perank.* In *Hagen v. Utah,* 510 U.S. 399, 114 S.Ct. 958, 127 L. Ed. 252 (1994), the U.S. Supreme Court affirmed the Utah Supreme Court's decision, holding that the Uintah Reservation had been diminished by Congress, and permitting the exercise of state jurisdiction within the former boundaries.

On August 3, 1992, after the Utah Supreme Court's slip opinions had been released in *Hagen* and *Perank* but prior to the grant of certiorari by the U.S. Supreme Court, the Ute Tribe reopened this case by filing a motion in the District Court for injunctive relief against the state pursuant to a claimed exception to the Anti-Injunction Act,

28 U.S.C. § 2283. Aplt. App. Tab E., pp. 26-27. The Tribe's motion sought to permanently enjoin the Utah Supreme Court from entering as final its decision in those cases, and to enjoin the State and its political subdivisions from enforcing or relying upon those decisions in any way. Id. The Tribe simultaneously sought a temporary restraining order or preliminary injunction having the same effect. Aplt. App. Tab B, pp. 10-15.

On August 31, 1992, the State and Local Defendants and the Ute Tribe, through counsel, entered into a stipulation for the entry of injunctive relief pending the decision of the District Court on the Ute Tribe's motion for permanent injunctive relief. The stipulation by its terms expires on the day after the District Court issues its decision on the Tribe's motion for injunctive relief. Aplt. App. Tab F, pp. 31-33. The District Court issued an Order (the "Injunction Order") incorporating the parties' stipulation concerning injunctive relief, on September 3, 1992, *nunc pro tunc* to August 2, 1992. Aplt. App Tab F, pp. 28-30.

In the ensuing months the District Court vacated several previously scheduled hearings on the Tribe's motion for injunctive relief pending the U.S. Supreme Court's consideration of the certiorari petition in *Hagen*, and subsequently pending the Supreme Court's decision on the merits. See Docket Sheet, Aplt. App. Tab B. On February 23, 1994, the U.S. Supreme Court issued its decision in *Hagen* affirming the decision of the Utah Supreme Court in *State v. Hagen* and ruling that the reservation had been diminished for jurisdictional purposes. On April 25, 1994, the State and Local Defendants filed a motion in the District Court to vacate and set aside the Injunction Order, and to dismiss the Ute Tribe's motion for permanent injunctive relief. Aplt. App. Tab G, pp. 36-65.

After a United States Magistrate dismissed a federal prosecution of an Indian for crimes occurring in Roosevelt, Utah, on the basis that *Hagen* had held that such

prosecutions were a state responsibility, the State and its subdivisions moved the Court for an Order modifying the Injunction Order to permit state prosecution of felonies within the former reservation boundaries. On May 2, 1994, the District Court temporarily modified the Injunction Order to permit the State and Local Defendants to prosecute felony crimes occurring on lands within the original boundaries of the Uintah Reservation which were not "Indian country" as defined by 18 U.S.C. § 1151 *et seq.* Aplt. App. Tab H, pp. 66-69. The District Court's modification was without prejudice to the claims of the parties, and did *not* determine the Indian Country status of particular lands. Id.

On September 12, 1994, prior to hearing oral arguments on the pending motions, the District Court entered its Pre-Trial Order, based upon a stipulation between the Ute Tribe and the State and Local Defendants. Aplt. App. Tab J, pp. 76-95. The Pre-Trial Order provided, *inter alia*, that lands within the former reservation boundaries that had been opened and settled pursuant to federal homestead and cash entry laws were not Indian country pursuant to 18 U.S.C. § 1151.[1] Aplt. App. Tab J, p. 88.

3. *Disposition Below.*

On April 2, 1996, the District Court issued a lengthy Memorandum Decision in connection with the pending motions. Aplt. App. Tab L, pp. 170-271. Judge Jenkins declined to rule on the merits of the Tribe's motion for injunctive relief and the state's motion to dissolve the Injunction Order. The District Court instead continued the Injunction Order in full force and effect, with the modification that "Indian Country" did not include "unallotted and unreserved lands of the Uintah Reservation

[1] The Court's stipulated finding that homesteaded lands were not Indian country was subject to the Ute Tribe's contention that the State and Local Defendants are collaterally estopped by *Ute Indian Tribe* from reliance on *Hagen*. Aplt. App. Tab J, p. 88.

that were opened to entry in 1905, to the extent that those lands were not later restored to tribal ownership." Aplt. App. Tab L, p. 265. This modification had the effect of permitting certain state felony prosecutions of Indians, but continued the injunction in effect as to all misdemeanor prosecutions of Indians and exercises of civil jurisdiction within the historic reservation boundaries, even in areas the Court held to be outside Indian Country.

In connection with the Memorandum Decision, Judge Jenkins also filed a Certificate and Request for Further Instructions (the "Request for Further Instructions") directed to the United States Court of Appeals for the Tenth Circuit. Aplt. App. Tab L, pp. 266-271. In the Request for Instructions, the Judge Jenkins noted the direct conflict between the Court of Appeals' mandate in *Ute Indian Tribe*, which held that all lands within the historic reservation boundaries were Indian country, and the decision of the United States Supreme Court in *Hagen*, which held that those boundaries had been diminished for jurisdictional purposes. Id. The District Court requested further instructions from the Court of Appeals in light of this conflict, and indicated that the Court of Appeals could "construe this court's request for instructions as an invitation to recall its own mandate for further consideration." Id. at 269.

On April 12, 1996, the State and Local Defendants filed their Notice of Appeal from Judge Jenkins' decision continuing the Injunction Order in effect, pursuant to 28 U.S.C. § 1292(a)(1). Aplt. App. Tab M, p. 272. On June 12, 1996, the appellants filed a motion pursuant to Fed. R. App. P. 27 for withdrawal and replacement of the mandate in *Ute Indian Tribe*.

SUMMARY OF THE ARGUMENT

1. *The Hagen Decision Conclusively Resolved the Reservation Boundary Issue.*

The United States Supreme Court granted certiorari "to resolve the direct conflict" between the United States Court of Appeals for the Tenth Circuit in *Ute Indian Tribe* and the decisions of the Utah Supreme Court in *State v. Hagen* and *Perank*. 114 S. Ct. at 964. The issue before each of these courts was identical: did Congress' decision early in this century to open the Uintah Reservation to non-Indian settlement do away with the historic boundaries of the reservation for jurisdictional purposes? If so, then the State of Utah was entitled to assert jurisdiction over unallotted opened lands "[a]s a doctrinal matter". *Hagen*, 114 S. Ct. at 964, citing *Solem v. Bartlett*, 465 U.S. 463, 467, 104 S. Ct. 1161, 1164 (1984). If not, then all lands within the historic boundaries remained "Indian country" pursuant to 18 U.S.C. § 1151(a), even if held in fee simple by non-Indians.

In the face of the "direct conflict" between *Ute Indian Tribe* and *State v. Hagen*, the U.S. Supreme Court affirmed the Utah Supreme Court's holding that the reservation had been diminished, and expressly rejected *Ute Indian Tribe's* conclusion that the Uintah Reservation had not been diminished or disestablished. This Court has since stated that *Hagen* "effectively overruled the contrary conclusion reached in the *Ute Indian Tribe* case, redefined the Reservation boundaries resulting from our earlier decision, and conclusively settled the question." *United States v. Cuch*, 79 F.3d 987, 989 (10th Cir. 1996).

2. *The District Court Has Wrongly Continued to Enjoin State Actions Outside Indian Country Despite Hagen's Affirmance of State Jurisdictional Authority.*

The Supreme Court issued its mandate in *Hagen* over two years ago. The District Court has nonetheless refused (with one limited exception) to dissolve the pre-*Hagen*

injunction prohibiting the State of Utah and its political subdivisions from exercising jurisdictional authority over Indian matters anywhere within the now-rejected boundaries set in *Ute Indian Tribe*. As a result, the Supreme Court's mandate has been frustrated, and the State and its subdivisions find themselves enjoined from performing basic governmental functions within large areas populated almost exclusively by non-Indians,[2] while the tribal and federal authority that purports to fill the void is jurisdictionally suspect.

The District Court's indefinite continuation of what was intended to be a stopgap solution pending the Supreme Court decision in *Hagen* erroneously interferes with the State of Utah's legitimate jurisdictional authority outside Indian country. The United States, the Ute Tribe, and the District Court itself concede that on a substantive basis the majority of fee lands within the former reservation boundaries are now *not* Indian country under 18 U.S.C. § 1151. Not only is there no basis in law for enjoining the exercise of state law outside Indian country, such an injunction is prohibited by the federal Anti-Injunction Act, 28 U.S.C. § 2283, and the federal Full Faith and Credit Act, 28 U.S.C. § 1738.

3. *The Court of Appeals Mandate in Ute Indian Tribe Should Be Withdrawn In Toto, Because It was Based upon an Erroneous and Now Discredited Interpretation of Statutory "Restoration" Language.*

In continuing the Injunction Order, the District Court felt itself compelled to follow this Court's mandate in *Ute*

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[2] See *Perank, supra*, 858 P.2d at 934, n. 10 (population in disputed area consists of 18,000 non-Indians and 300 Indians, not all of the latter being Ute Tribal members). The most problematic aspect of the injunction has been the District Court's express prohibition of state misdemeanor prosecutions against Indians within the expansive boundaries set in *Ute Indian Tribe*, but the injunction also broadly prohibits state action in civil matters such as child welfare and family matters, environmental permitting and enforcement, and collection of taxes.

Indian Tribe, notwithstanding the U.S. Supreme Court's intervening decision to "effectively overrule" that case. While the State of Utah believes that the *Hagen* decision relieved the District Court of the obligation to follow the mandate in *Ute Indian Tribe*, the state shares the District Court's belief that *Ute Indian Tribe* and *Hagen* are irreconcilable. The Court of Appeals' holding in *Ute Indian Tribe* was based upon one fundamental premise—that operative congressional language restoring reservation lands to the public domain did not evidence congressional intent to disestablish the reservation. 773 F.2d at 1095. *Hagen* expressly repudiated that core conclusion:

> Our cases considering *operative* language of restoration [to the public domain] have uniformly equated it with a congressional purpose to terminate reservation status. . . . In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status. Thus the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation. Indeed, we have found only one case in which a Federal Court of Appeals decided that statutory restoration language did not terminate a reservation, *Ute Indian Tribe*, 773 F.2d at 1092, a conclusion the Tenth Circuit has since disavowed as "unexamined and unsupported." *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400, cert. denied, 498 U.S. 1012 (1990)

114 S. Ct. at 967. (Emphasis in original).

With *Ute Indian Tribe*'s theory that restoration language is not determinative of disestablishment overturned, the decision also cannot stand as to either the forest lands or the former Uncompahgre Reservation. The Court of Appeals' decision that the Uncompahgre Reservation remained in existence was based purely on this theory.

Similarly, the court's belief that national forest lands set aside out of the Uintah Reservation had remained within tribal jurisdiction was premised explicitly on the absence of Congressional intent to diminish the surrounding boundaries, a controlling assumption that is no longer valid.

Judge Jenkins' 1981 District Court opinion, which sets forth voluminous and overwhelming evidence showing that neither area retains reservation status, remains the definitive analysis of these lands. Even the United States, in its capacity as trustee for the Ute Tribe, has argued to the Supreme Court that the Tenth Circuit's decision concerning Uncompahgre was mistaken, and that the reservation no longer exists. Aplt. App. Tabs R, S. With the clear change in prevailing law since *Ute Indian Tribe*, issues concerning these lands will arise again and again. The Court of Appeals has the opportunity, based upon clear Supreme Court precedent, to resolve these issues fully and finally. It can do so by recalling the mandate in *Ute Indian Tribe*, and substituting the correctly decided original panel decision of the Court of Appeals. *Ute Indian Tribe v. State of Utah*, 716 F.2d 1298 (10th Cir. 1983).

4. *The District Court Misinterpreted Hagen's Jurisdictional Effect on Non-Trust "Fee" Lands.*

The District Court has also adopted an unduly narrow interpretation of *Hagen*, thus permitting continued tribal jurisdiction over certain fee simple lands.[2] Under 18 U.S.C. § 1151, fee lands (e.g. lands not held in trust by

[2] The State of Utah does not and has at no time in this litigation sought to exercise jurisdiction over lands held in trust by the United States for the Tribe and individual Indian allottees. All of these lands are undisputedly Indian country because of their trust status. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905, 910, 112 L.Ed. 2d 1112 (1991). This case relates solely to whether the Tribe has jurisdiction over non-Indian federal lands, as well as state, and private lands within the historic reservation boundaries.

the United States for a tribe or individual Indian allottee) may be considered Indian country only if the lands are (a) within the limits of a reservation; or (b) within a dependent Indian community (an issue not before the Court). Individual Indian allotments outside reservation boundaries remain in Indian Country pursuant to 18 U.S.C. § 1151(c) only to the extent that Indian title has not been extinguished.

The District Court ruled that Congress' diminishment of the reservation boundaries left the boundaries conterminous with the boundaries of scattered individual allotments and parcels reserved at the time for communal tribal use, particularly the tribal grazing reserve. Memorandum Decision at 18-19, Aplt. App. Tab L, pp. 187-188. Under this theory, lands that have left Indian trust ownership other than through the original opening of the reservation (primarily former trust allotments sold into non-Indian ownership prior to 1934) remain within the boundaries of a reservation because the parcel boundaries each ostensibly became a reservation boundary.

This conclusion contradicts both established reservation diminishment law and multiple assertions by the Tribe in this litigation and in *Perank/Hagen*. At all times prior to the final briefing of the injunction issues before the District Court, the Tribe clearly asserted that if *Perank/Hagen* were affirmed, tribal jurisdiction would be limited to tribal lands and trust allotments. Now that this eventuality has come to pass, the Tribe has abandoned its prior position in an attempt to retain jurisdiction over at least some non-trust lands. If upheld, this position will further complicate jurisdictional decisions in the already "checkerboarded" Uintah basin. Instead of relatively straightforward determinations based upon trust vs. non-trust status (as was the case for eighty years prior to *Ute Indian Tribe*), the District Court's position requires a historical title review each time jurisdiction on non-Indian lands may be an issue. Inclusion of the disputed fee lands

in Indian country is unjustified from both a legal and practical standpoint.

5. *Overview.*

The jurisdictional issue before the Court has been an emotional one for the citizens of Utah, Indian and non-Indian alike, in the ten years since *Ute Indian Tribe.* The Ute Tribe and its counsel have repeatedly vilified the Utah Supreme Court, and the State's attorneys, for having argued (as it turns out, correctly) in *Perank* that the Court of Appeals' decision in *Ute Indian Tribe* was mistaken. The Tribe's portrayal of the State as having pursued a cunning and deceitful strategy to deprive the Ute Tribe of jurisdiction by prosecuting Indians in defiance of the Tenth Circuit is grossly untrue. The State has acted with good faith towards the Tribe, and certainly intends to do so in the future.

That said, there is and has been a profound disagreement between the State and the Tribe over the jurisdictional boundaries of the reservation. *Ute Indian Tribe* effectively created the second largest Indian reservation in the continental United States for some 1500 tribal members, and subjected vast areas where there are no Indian residents and no Indian lands to tribal jurisdiction. Utah has a strong and legitimate interest in the ultimate resolution of this dispute.

The District Court has chosen not to implement the Supreme Court's ruling in *Hagen.* Whatever the legal merits or demerits of the District Court's decision, the state strongly believes that the injunction has exacerbated an already difficult situation, as disputes that would otherwise be resolved by discussion are viewed in the prism of litigation. In retrospect, it is unfortunate that in 1986 the U.S. Supreme Court did not grant certiorari in *Ute Indian Tribe* and resolve the issue of jurisdiction at that time. With *Hagen*, however, the Supreme Court has done so, fully and finally. This Court should implement the

Supreme Court's mandate, and give the parties the opportunity to resolve their differences outside the courtroom.

ARGUMENT

I. THE DISTRICT COURT COMMITTED ERROR BY CONTINUING THE INJUNCTION ORDER OUTSIDE INDIAN COUNTRY ONCE *HAGEN* BECAME FINAL.

A. *Standard of Review.*

In reviewing the District Court's decision to continue an injunction, the Court of Appeals uses an abuse of discretion standard, and examines "whether the district court committed an error of law or relied on clearly erroneous fact findings." *Walmer v. Department of Defense*, 52 F. 3d 851, 854 (10th Cir. 1995). Questions of law decided by the District Court in connection with a decision are reviewed *de novo*. *Kansas ex rel Stephan v. Adams*, 608 F. 2d 861, 867 n. 5 (10th Cir. 1979); see also *Blalock Eddy Ranch v. MCI Telecommunications*, 982 F. 2d 371, 375 (9th Cir. 1992) (applicability of Anti-Injunction Act is issue of law to be reviewed *de novo*).

B. *The District Court Has Enjoined the State from Exercising Jurisdiction In Areas Undisputedly Not Indian Country.*

As a general rule in Indian affairs, the existence of federal and tribal jurisdictional authority is determined in both civil and criminal matters by whether the locus of the subject activity has been determined to be "Indian country" pursuant to 18 U.S.C. § 1151. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n. 2, 95 S. Ct. 1082, 1085, n. 2; *Pittsburgh & Midway Coal Mining Co. v. Watchman*, 52 F. 3d 1531, 1540-41 (10th Cir. 1995).

In its April 2, 1996 Memorandum Decision, the District Court concluded:

> According to the United States Supreme Court's decision in *Hagen* . . ., the 1902-1905 Acts "opening" the Uintah Reservation to non-Indian entry and settlement operated to restore the unallotted and unreserved lands of that Reservation to the public domain. In doing so, the 1902-1905 Acts diminished —that is, reduced or curtailed—the boundaries of the reservation to the extent of the lands thus "opened." *Insofar as these "opened" lands were not later returned to tribal ownership and jurisdiction by subsequent congressional and administrative action, they ceased to have reservation status in 1905 and are no longer found within "Indian Country" within the meaning of 18 U.S.C. § 1151 (1994).* Memorandum Decision at 90 (Emphasis added).

Although the State of Utah believes that certain other "fee" lands within the former reservation boundaries—particularly former allotments no longer in Indian ownership—are also no longer Indian country after *Hagen*, the District Court's conclusion that "opened" lands now held in fee ownership are no longer Indian country is a general point of agreement between the Tribe, the United States, and the State.[3] The District Court nonetheless refused to dissolve its injunction concerning these areas—the very areas that the courts in *Hagen* and related cases have held to be within state jurisdiction—including the towns of Roosevelt, Duchesne, and Myton.

The District Court chose to maintain the injunction in effect because it felt that the Court of Appeals' mandate in *Ute Indian Tribe* required it to do so:

> Pursuant to the court of appeals' mandate, conducting "further proceedings in accordance with the opin-

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[3] The Tribe concedes that these lands are not Indian country subject to its contention that the State is collaterally estopped from relying on *Hagen* in this litigation. Aplt. App. Tab J, p. 88. The United States has also recognized that these lands are not Indian Country. See Tr. 5/12/94.

> ion" in *Ute Indian Tribe* requires continuing enforcement of the orders previously entered by this court preserving the jurisdictional status quo consistent with that ruling. Memorandum Decision at 93.

The District Court's conclusions are erroneous for several reasons. First, although the District Court judiciously showed deference to the mandate of this court in *Ute Indian Tribe*, Tenth Circuit law does in fact permit a district court to depart from the Court of Appeals' mandate when there has been a clear change of intervening law. In light of this Court's statement that *Hagen* "effectively overruled" *Ute Indian Tribe*, it was an abuse of discretion for the District Court to enjoin the state outside of Indian country based upon the *Ute Indian Tribe* mandate. Second, the Anti-Injunction Act, 28 U.S.C. § 2283, generally prohibits the federal judiciary from enjoining state judicial proceedings or reliance on such proceedings by state officers. Once *Perank/Hagen* became final, collateral estoppel could not be applied against the State. The District Court was obligated to give *Hagen* full faith and credit under the Full Faith and Credit Act, 28 U.S.C. § 1738, and lost any power under the relitigation exception to the Anti-Injunction Act to enjoin state actions taken in reliance upon *Hagen*.

C. *The District Court Abused Its Discretion By Refusing to Apply Hagen In Determining the Geographic Scope of Its Injunction.*

1. The Mandate Rule and the Law of the Case.

The District Court's analysis of the "mandate rule" led it to conclude that it must seek permission from the court of appeals prior to departing from *Ute Indian Tribe*'s holding that the reservation had not been diminished. Mem. Dec. at 84, Aplt. App. Tab L, p. 253. It went on to conclude that the mandate in *Ute Indian Tribe required*

it to continue the injunction against state jurisdiction within the historic reservation boundaries, notwithstanding the court's own conclusion that opened lands were no longer Indian country pursuant to *Hagen*. Mem. Dec. at 93, Alpt. App. Tab L, p. 262.

The "mandate rule" is a subsidiary component of the doctrine of the "law of the case." This court has described the law of the case doctrine as follows:

> The law of the case doctrine posits that "[w]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L.Ed. 2d 358 (1979). . . . [T]he law of the case doctrine is solely a rule of practice and not a limit on the power of the court. *Messinger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 740, 56 L.Ed. 1152 (1912). *See also Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981) (law of the case doctrine is not an "inexorable command" but a rule to be applied with good sense.)

Mason v. Texaco, Inc., 948 F. 2d 1546, 1553 (10th Cir. 1991). The purpose of the law of the case doctrine is to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4478, at 788 (1981).

The mandate rule functions as a part of the law of the case doctrine by binding every court to honor rulings in the case by superior courts. *Casey v. Planned Parenthood of Southeastern Pennsylavnia*, 14 F. 3d 848, 856 (3rd Cir. 1994). It is important to note that the mandate rule is applicable only to courts lower in the judicial hierarchy than the court rendering the decision in question; a court

of appeals may (and perhaps must) reconsider and redecide its own decisions on the basis of intervening Supreme Court decisions.[4] See *EEOC v. K-Mart Corp.*, 796 F. 2d 139, 146 (6th Cir. 1986).

2. District Courts May Depart from an Appellate Mandate Where There Has Been a Clear Change In Intervening Law.

It is difficult to fault the District Court for exhibiting substantial deference to this Court. Nonetheless, a District Court may in some circumstances depart from an appellate mandate in the face of intervening law to the contrary. In *Ad-Vantage Telephone Dir. Co. v. GTE Directories*, 943 F. 2d 1511 (11th Cir. 1991), the Eleventh Circuit stated that *trial court* proceedings subsequent to an appellate mandate must follow the mandate unless:

> the presentation of new evidence *or an intervening change in the controlling law* dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice.

943 F. 2d at 1518, citing *Piambino v. Bailey*, 757 F. 2d 1112, 1119-1120 (11th Cir. 1985), cert. den. 476 U.S. 1169 (1986) (Emphasis in original).

The ability of trial courts to depart from an appellate mandate where there has been a clear intervening change in law is well-recognized. See e.g. *Johnson v. Uncle Ben's, Inc.*, 965 F. 2d 1363, 1369-1370 (5th Cir. 1992); *Lenard v. Argento*, 808 F. 2d 1242, 1245-1246 (7th Cir. 1987). The Tenth Circuit has adopted the same general standard for departure from the law of the case as other circuits. *Pittsburg & Midway Coal Mining Co. v. Watch-*

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[4] The District Court clearly drew this distinction, noting what it believed to be a "critical difference in posture between the court of appeals and the district court" in dealing with the effect of a later Supreme Court decision on an appellate mandate. Mem. Dec. at 71-72.

man, 52 F. 3d 1531, 1536 n. 4 (10th Cir. 1995); *United States v. Monsisvais*, 946 F. 2d 114, 117 (10th Cir. 1991). In line with this standard, the Tenth Circuit has permitted a trial court to depart from the mandate where different evidence surfaced on retrial. *Mason v. Texaco*, 948 F. 2d 1546, 1553 (10th Cir. 1991). There is no question that a District Court's departure from an appellate mandate should take place cautiously and rarely, but *Mason* indicates it is permissible when the conditions for departure from the law of the case are present.

3. The District Court Should Have Applied *Hagen*.

This is such a case. The Supreme Court has ruled on the *exact* same issues decided in *Ute Indian Tribe*, and has effectively overruled that decision. The District Court recognized that the two decisions are fundamentally irreconcilable. Although the District Court's opinion makes it clear that it is unhappy with the course events have taken, the federal courts have an obligation to broadly apply applicable Supreme Court decisions. *Guidry v. Sheet Metal Workers Int'l.*, 10 F. 3d 700, 706 n. 3 (10th Cir. 1993), citing *McCoy v. Massachusetts Inst. Of Technology*, 950 F. 2d 13, 19 (1st Cir. 1991) ("If lower courts felt free to limit Supreme Court opinions precisely to the facts of each case, then our jurisprudence would be in shambles. . . .").

The injunction has created significant jurisdictional and practical problems. The state cannot now prosecute Indian offenders in areas such as the town of Roosevelt, but tribal jurisdiction over areas outside Indian country is uncertain at best. See *General Motors Acceptance Corp. v. Chischilly*, 628 P. 2d 683 (N.M. 1981) (civil jurisdiction did not extend to tribal member on off-reservation trust lands). It seems entirely possible that the Ute tribal court does not have jurisdiction to prosecute misdemeanor offenses outside Indian country, and, indeed, the state is aware of no successful tribal prosecutions of off-trust lands misdemeanors in the interval since the Memorandum

Decision.[5] As a practical matter, the injunction's artificial delineation between felonies and misdemeanors forces state and local law enforcement personnel to make impossible decisions to comply with the injunction. If an apprehended theft suspect has $251 of stolen goods, a felony, their citation was legal; if the goods are worth $249, a misdemeanor, the officer is in contempt of the District Court. See *Utah Code Ann.* § 76-6-412. Similar problems of arise in determining whether an ongoing assault is a misdemeanor or felony. See *Utah Code Ann.* §§ 76-5-102, 103. The problems extend beyond criminal matters. For example, the state is enjoined from routinely collecting sales from tribal members even if the nexus of the tax is outside Indian country. With every day that the injunction is in place the lost revenues accrue, without any possibility that the state will recover them in the future.

The District Court could legally have departed from the mandate of the Court of Appeals in *Ute Indian Tribe* once the U.S. Supreme Court effectively overruled that case. By maintaining indefinitely its injunction against state jurisdiction in areas outside Indian country, the District Court has abused its discretion.

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[5] While this may seem to be a minor issue, misdemeanor crimes include serious offenses such as assault, drunk driving, and negligent homicide. The state has an obligation to all of its citizens, Indian and non-Indian alike, to preserve public safety. It is strongly concerned that the Injunction Order has had the practical effect of creating a jurisdictional vacuum for misdemeanor crimes in the most populous areas in the Uintah Basin.

D. *The Federal Anti-Injunction and Full Faith and Credit Acts Prohibit the District Court from Enjoining the State's Reliance on Hagen/Perank or Taking Actions Having That Effect.*

1. The Anti-Injunction Act and the Relitigation Exception to That Act.

The Ute Tribe's Motion for Permanent Injunction Relief is barred by the Anti-Injunction Act, 28 U.S.C. § 2283. The Anti-Injunction Act prohibits a federal court from staying proceedings in a state court except where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 28 U.S.C. § 2283. The Anti-Injunction Act was enacted to preserve the independence of state judicial systems. *Brooks v. Barbour Energy Corp.*, 804 F. 2d 1144, 1146 (10th Cir. 1986), citing *Commodity Futures Trading Commission v. Chilcott Portfolio Management*, 713 F. 2d 1477, 1484 n. 5 (10th Cir. 1983). Congress has provided for exceptions to the Anti-Injunction Act, which permit (although do not require) federal injunctions of state proceedings. These exceptions are narrow, and may "not be enlarged by loose statutory construction." *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287, 90 S. Ct. 1739, 1743 (1970). Any doubts about the propriety of the injunction should be resolved against its issuance. *Brooks v. Barbour Energy Corp., supra.* The particular exception to the Anti-Injunction Act relied upon by the Tribe in this case is the relitigation exception. Aplt. App. Tab E, pp. 26-27. This exception permits a federal injunction of state court proceedings where the party asserting a claim or issue in the state court is barred from doing so by principles of res judicata or collateral estoppel.

2. Collateral Estoppel Became Irrelevant Once *Hagen* Became Final.

Of course, the relitigation exception cannot apply unless the party to be enjoined is in fact barred by res judicata or collateral estoppel from proceeding in the state action. In its Memorandum Decision, the District Court devoted 28 pages of analysis to whether the State of Utah was barred by the doctrine of collateral estoppel from relitigating the reservation boundary issue or relying on *Hagen*, before finally determining not to rule on the issue because of the mandate rule. Mem. Dec. 49-67, Aplt. App. Tab L, pp. 217-235. Although the Court's conclusion that the mandate rule governs was correct, its lengthy analysis of collateral estoppel was unnecessary. The State of Utah is not now relitigating the reservation boundaries—the only situation where collateral estoppel might apply.[6] The United States Supreme Court has issued a final ruling, its mandate has issued, and the Utah Supreme Court has issued its remittitur in *Hagen* and *Perank*. The boundary litigation is over. The question before the Court is one of law of the case—what effect the final decision in *Hagen* has in the reborn case of *Ute Indian Tribe*—rather than

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[6] As a related argument, the Ute Tribe has contended that, because it was not a party to *Hagen*, it cannot be bound by that decision. Doc. 30 at 12, citing *Georgia v. South Carolina*, 497 U.S. 376, 110 S. Ct. 2903, 2913 (1990). It believes that *Hagen* at most permits the State of Utah to assert jurisdiction over non-member Indians within the former reservation boundaries, while *Ute Indian Tribe* governs the relationship between the state and Ute tribal members. The argument that the Ute Tribe may not be bound by *Hagen* misses the point. The Tribe's non-participation in *Hagen* means that the Tribe's reservation boundary claims cannot be summarily dismissed on collateral estoppel grounds—it is not *bound* under preclusion principles. That is all that *Georgia v. South Carolina* and related cases say. However, under the doctrine of *stare decisis*, the U.S. Supreme Court has in *Hagen* provided the applicable rule of decision under which jurisdictional disputes must be resolved by the courts.

collateral estoppel. *Hull v. Freeman*, 991 F. 2d 86, 90 (3rd Cir. 1993) (reconsideration of issues in same case governed by law of the case, not collateral estoppel). If the Court of Appeals' mandate in *Ute Indian Tribe* is no longer viable, whether through application of intervening law or the Court of Appeals' recall of the mandate, then a claim of collateral estoppel based upon that decision cannot stand.

3. *Parsons Steel* and the Full Faith and Credit Act.

Even were collateral estoppel a relevant concept once *Hagen* became final, the doctrine would not provide support for the continuation of the Injunction Order outside Indian country. The decision of the United States Supreme Court in *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986) applies here. In *Parsons Steel*, the Supreme Court held that under the Full Faith and Credit Act, 28 U.S.C. § 1738, once a state court has rejected a claim that a federal judgment is binding through res judicata, federal courts must give the state judgment effect. 106 S. Ct. at 772. Perhaps the most significant aspect of *Parsons Steel* for the purposes of this case is the Supreme Court's description of the remedy in the event the prevailing party in a prior federal action feels that the state court has failed to give the federal judgment proper preclusive effect:

> Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court.

106 S. Ct. at 772-773.

Of course, that is what happened here. The Utah Supreme Court effectively ruled on the collateral estoppel issue in *State v. Hagen*.[7] In *State v. Hagen*, the Utah

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[7] The *Perank* court also addressed the applicability of collateral estoppel in a lengthy footnote, discussing why under Utah law the

Court of Appeals had ruled in favor of Mr. Hagen on grounds including collateral estoppel. *State of Utah v. Hagen*, 802 P. 2d 745, 747 (Utah App. 1990), *reversed* 858 P. 2d 925 (Utah 1992). The Utah Supreme Court reversed on the basis of *Perank*, effectively rejecting the state court of appeals' holding on the collateral estoppel issue. On writ of certiorari, the U.S. Supreme Court then declined to rule on the issue despite extensive briefing and argument, the petitioner having failed to raise it in his petition for certiorari. *Hagen*, 114 S. Ct. at 965. In its Memorandum Decision, the District Court recognized that "it seems fairly apparent that the question of the collateral estoppel effect of *Ute Indian Tribe* had been raised and ruled on in *Hagen*." Mem. Dec. at 52, n. 54. This being the case, the Full Faith and Credit Act, as interpreted in *Parsons Steel*, required the District Court to give effect to the Utah Supreme Court's decision that *Ute Indian Tribe* did not collaterally estop the State from readdressing the reservation boundary issue.

II. THE COURT OF APPEALS SHOULD RECALL ITS MANDATE IN *UTE INDIAN TRIBE*, AND ISSUE A NEW MANDATE CONSISTENT WITH *HAGEN*.

A. *Standard of Review.*

Concurrently with this appeal, the State of Utah has filed a motion pursuant to Fed. R. App. P. 27 asking the Court of Appeals to recall its mandate in *Ute Indian Tribe*

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doctrine would not have applicability to bar reconsideration of the reservation boundary issue. 858 P. 2d at 931, n. 3. The Court noted that res judicata is a waivable defense, and that neither Perank, the U.S. Department of Justice, or the Tribe had suggested that *Ute Indian Tribe* had res judicata effect in the case before it—in fact, the Department of Justice had indicated in its brief that the Utah Supreme Court was entitled to redecide the issue. 858 P. 2d at 931, n. 2. The *Perank* court's discussion of the issue is a clear indication of the Utah Supreme Court's analysis of the collateral estoppel issue.

and issue a new mandate consistent with the Supreme Court's analysis of the reservation disestablishment issue in *Hagen*. The Court of Appeals also has before it the April 2, 1996 Certificate and Request for Further Instructions of the District Court, in which the District Court has asked the Court of Appeals for direction concerning the continuing effect of the *Ute Indian Tribe* mandate after *Hagen*.[8]

The Court of Appeals has the inherent power to recall a prior mandate upon a showing of good cause. *Coleman v. Turpin*, 827 F. 2d 667, 671 (10th Cir. 1987); see also 16 C. Wright, A. Miller & E. Gressman, *Federal Practice & Procedure* § 3938, at 276-278 (1977) ("The . . . broad power to recall . . . persists, as a matter of inherent power, subject to no definite time constraint."). Although recall of a prior mandate is subject to the doctrine of the law of the case, that doctrine does not prevent the recall of a mandate issued in prior litigation between two parties if "controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F. 3d 1531, 1536 n. 4 (10th Cir. 1995); *United States v. Monsisvais*, 946 F. 2d 114, 117 (10th Cir. 1991); *see also Odum v. Boone*, 62 F. 3d 327, 333 n. 2 (10th Cir. 1995) (intervening Supreme Court decision on point controls over prior Court of Appeals decision).

In *Higgins v. California Prune & Apricot Growers, Inc.*, 3 F. 2d 896 (2d Cir. 1924), Judge Learned Hand succinctly described the Court of Appeals' obligation to give effect to an intervening Supreme Court decision notwithstanding its prior mandate:

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[8] In the Request for Further Instructions, the District Court stated: "If it so chooses, the court of appeals may construe this court's request for instructions as an invitation to recall its own mandate for further consideration." Aplt. App. Tab L, p. 269.

> The District Court declined to consider the effect of [an intervening Supreme Court] decision, feeling bound by the mandate of this court, rightly, as we think. If, however, we are free to reconsider our earlier decision at all, there would seem to be no question of our duty to follow the later decision of the Supreme Court. We think we are so free . . . . [I]t is now well settled that the "law of the case" does not rigidly bind a court to its former decisions, but is only addressed to its good sense. There can surely be no greater reason for changing our views than because the Supreme Court has directly ruled upon the precise point in the interim.

3 F. 2d at 897-898 (citations omitted). Judge Hand's view has been echoed in later cases; the Sixth Circuit has aptly described the effect of a prior panel ruling in the same case once the Supreme Court has issued an intervening decision on the issue in question in a different case:

> We leave to the last appellee's argument that this court's original opinion provides the law of the case. *Whatever weight a panel of this court should give to a prior opinion of another panel of our court, it clearly cannot control as opposed to an opposite view expressed in final language by the United States Supreme Court in a similar case.*

EEOC v. K-Mart Corp., 796 F. 2d 139, 146 (6th Cir. 1986) (Emphasis added).

As more fully set forth below, the primary substantive premise behind this Court's opinion in *Ute Indian Tribe* was that after *Solem v. Bartlett*, 465 U.S. 463, 104 S. Ct. 1161 (1984) ("*Solem*"), Congressional language restoring reservation lands to the public domain was not determinative of reservation disestablishment. *Hagen* expressly repudiated that premise in a case involving the identical record and the identical issue. As Judge Hand recognized,

where the Supreme Court has directly ruled upon the precise point in the interim, the court's prior inconsistent mandate must give way.

B. *Hagen Overruled Ute Indian Tribe's Fundamental Premise That Statutory Restoration Language Is Insufficient to Infer Disestablishment.*

1. The Surplus Land Acts.

Ute Indian Tribe, Perank and *Hagen* all hinged upon whether a series of acts passed by Congress between 1902 and 1905 disestablished the boundaries of the Uintah Reservation. The first act in question, the Act of May 27, 1902, ch. 888, 32 Stat. 263 (the "1902 Act"), provided that if the majority of the adult male members of the Uintah and White River Indians consented, the Secretary of Interior should make allotments of specified quantities of reservation lands to tribal members, and that after the deadline for making such allotments, "all the unallotted lands within said reservation shall be restored to the public domain."

Shortly after the 1902 Act, the U.S. Supreme Court held that Congress could unilaterally allot Indian lands and alter reservation boundaries without tribal consent. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-568, 23 S. Ct. 216, 222, 47 L.Ed. 299 (1903). Congress subsequently directed the Secretary of Interior to allot the Uintah lands unilaterally if the Indians did not give their consent by June 1 of that year, and deferred the opening of the unallotted lands "as provided by the [1902 Act]" until October 1, 1904. Act of March 3, 1903, ch. 994, 32 Stat. 998 (the "1903 Act"). In 1904, Congress again deferred the opening "as provided by the [1902 and 1903 Acts]" until March 10, 1905. Act of April 21, 1904, ch. 1402, 33 Stat. 207 (the "1904 Act"). Finally, in 1905, Congress provided that the manner of opening would be as follows:

> That the said unallotted lands . . . shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof.

Act of March 3, 1905, ch. 1479, 33 Stat. 1069 (the "1905 Act"). President Theodore Roosevelt subsequently issued a proclamation stating that, pursuant to the 1902, 1903, 1904 and 1905 Acts, all the unallotted lands in the reservation would be opened to entry effective August 28, 1905. 34 Stat. 3119-3120.

2. The District Court and Panel Decisions.

The District Court's lengthy 1981 decision concerning the disestablishment issue turned upon whether the opening of the reservation had been accomplished by the 1902 Act or the 1905 Act. *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1122-1132 (D. Utah 1981). The District Court stated:

> Without much question, opening of the Uintah Reservation under the original terms of the 1902 Act would have accomplished the termination of the reservation; the unallotted lands were to be "restored to the public domain"—language precisely suited to disestablishment under *Seymour v. Superintendent*, 368 U.S. 351, 354-356, 82 S. Ct. 424, 426-427, 7 L. Ed. 2d 346 (1962), and *Mattz v. Arnett*, 412 U.S. 481, 504 n. 22, 93 S. Ct. 2245, 2257, 37 L.Ed. 2d 92 (1975).

521 F. Supp. at 1122. The District Court concluded, however, that the 1905 Act effectively repealed the public domain language of the 1902 Act, and that in the absence of such language, the opening of the reservation in 1905 had not disestablished it. 521 F. Supp. at 1131-1132.

The initial panel decision rendered by this Court in *Ute Indian Tribe* reached the opposite conclusion about which statute accomplished the opening of the Uintah Reservation. *Ute Indian Tribe v. State of Utah*, 716 F. 2d 1298, 1309-1312 (10th Cir. 1983), *vacated* 773 F. 2d 1087. Writing for the panel majority, Chief Judge Seth held that the 1905 Act was not intended to affect the substantive terms of the 1902 Act, which thus remained the operative statute[9] 716 F. 2d at 1312. He further concluded that Congress' inclusion of language within the 1902 Act restoring reservation lands to the public domain was in itself was sufficient to infer disestablishment: "a phrase such as 'vacated and restored to the public domain' seems to be a sufficient though not a necessary factor in disestablishment." 716 F. 2d at 1303.

Judge Seth's conclusion was based in large part upon the Supreme Court's analysis of the disestablishment of the Lake Traverse Indian Reservation in *DeCoteau v. District County Court*, 420 U.S. 425, 95 S. Ct. 1082, 43 L.Ed. 2d 300 (1975). In that case, the Supreme Court held that the Lake Traverse reservation had unquestionably been returned to the public domain, "stripped of reservation status." 420 U.S. at 446, 95 S. Ct. at 1094. Judge Seth noted that the Supreme Court spoke as if a restoration to the public domain was synonymous with "stripped of reservation status" and that restoration language therefore settled the issue of disestablishment.[10] 716 F.2d at 1302. The panel therefore reversed the trial court's determination that unallotted opened lands re-

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[9] Judge Seth noted that this Court had previously decided in *Hanson v. United States*, 153 F. 2d 162, 162-163 (10th Cir. 1946), that the 1902 Act had been the operative statute restoring the reservation to the public domain, with the 1905 Act merely extending the date of the opening. 716 F. 2d at 1311.

[10] In *Hagen*, the Supreme Court validated Judge Seth's analysis by expressly holding that restoration language evidences congressional intent with respect to restored lands inconsistent with the continuation of reservation status. 114 S.Ct. at 967.

mained part of the Uintah Valley reservation.[11] 716 F. 2d at 1315.

3. The *En Banc* Court's Mistaken View of *Solem v. Bartlett.*

Subsequent to the August, 1983 panel decision in *Ute Indian Tribe,* this Court granted rehearing of the case *en banc.* In the interval between the grant of rehearing and the *en banc* decision in September, 1985, the United States Supreme Court decided *Solem v. Bartlett,* 465 U.S. 463, 104 S. Ct. 1161, 79 L.Ed. 2d 443 (1984) (*"Solem"*). In reversing the panel decision and holding that the original Uncompahgre and Uintah Valley reservations had not been disestablished, the *en banc* majority in *Ute Indian Tribe* mistakenly believed that *Solem* had changed the law in reservation boundary cases to minimize the effect of restoration language on the disestablishment issue.

The *en banc* decision rests upon the core proposition that operative Congressional language restoring reservation lands to the public domain "is *not* the same as a congressional state of mind to disestablish," and hence "does *not* reliably establish the clear and unequivocal evidence of Congress' intent to change the boundaries." 773 F. 2d at 1092 (emphasis added). In so holding, the majority acknowledged that this had not been the law prior to *Solem,* and, indeed, all judges who had considered this case before *Solem* agreed that operative restoration language was synonymous with disestablishment.[12] To the

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[11] The panel decision in *Ute Indian Tribe* also affirmed the trial court's holding that the original Uncompahgre Reservation was disestablished by Congress pursuant to the Act of June 7, 1897, and no longer existed, as well as the trial court's finding that the national forest lands were no longer part of the reservation. Id.

[12] As noted above, the District Court concluded that the 1902 Act was not the operative act opening the reservation, but stated that had it been, the reservation would have been terminated. 521

Ute Tribe court, however, *Solem* altered this long-standing principle of interpretation: "Ultimately, I interpret *Solem* to hold that 'public domain' language standing alone is insufficient to support a finding of explicit congressional intent to disestablish." 773 F. 2d at 1095 (Seymour, J., concurring). Based upon their view that *Solem* had altered reservation disestablishment jurisprudence, the majority concluded that neither the Uintah Valley reservation nor the Uncompahgre Reservation had been diminished or disestablished. The Court went on to find that it was the 1905 Act that actually effected the opening, rather than the 1902 Act. 773 F. 2d at 1089.

4. The Supreme Court Held in *Hagen* that Restoration to the Public Domain Is Synonymous With Disestablishment.

In *Hagen*, the U.S. Supreme Court accepted certiorari "to resolve the direct conflict" between *Ute Indian Tribe* and the decisions of the Utah Supreme Court in *Perank* and *State v. Hagen*. The Utah decisions had held, contrary to *Ute Indian Tribe*, that the Uintah Reservation had been diminished by Congress, and accordingly had upheld the exercise of state criminal jurisdiction over an Indian defendant for acts occurring in Myton, Utah, within the historic reservation boundaries. The Utah Supreme Court in *Perank* had engaged in a lengthy analysis of whether the restoration language contained in the 1902 Act established the necessary congressional intent to diminish the reservation, and concluded that operative statutory language restoring reservation land to the public demain established Congress' intent to diminish the reservation. *Perank* court noted that, with the sole exception of *Ute Indian Tribe*, every relevant decision had considered restoration language to be "synonymous with extinction of

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F. Supp. at 1122. In his dissent to the panel opinion, Judge Doyle evidenced a similar understanding that operative restoration language meant disestablishment. 716 F.2d at 1319.

reservation status." 858 P. 2d at 939. The *Perank* court went on to hold that the 1902 Act rather than the 1905 Act "established the basic statutory authority for opening the Uintah Reservation and that Congress intended thereby to diminish the Reservation." 858 P. 2d at 927.

In *Hagen*, a seven member majority of the U.S. Supreme Court sided squarely with the Utah Supreme Court. Historically, federal reservations of public lands for various purposes had been made specifically to remove lands from the public domain, e.g. from the possibility of settlement. It followed that when lands so reserved were "restored" to the public domain, their previous public use was extinguished. 114 S. Ct. at 966. Reviewing its prior disestablishment cases, the Court found that its "cases considering *operative* language of restoration have uniformly equated it with a congressional purpose to terminate reservation status." [13] The Court went on to hold:

> In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act

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[13] The *Hagen* court also distinguished language in *Solem* that the *Ute Indian Tribe* court relied upon to lessen the effect of restoration language. The act in *Solem* had made reference to tribal rights to harvest timber on lands within the reservation so long as the lands were part of the public domain. *Solem, supra*, 104 S. Ct. at 1168. The *Ute Indian Tribe* court had relied upon this this reference to find that restoration language standing alone is insufficient to find congressional intent to disestablish, since the *Solem* court had found no disestablishment. *Ute Indian Tribe, supra*, 773 F. 2d at 1095 (Seymour, J., concurring). *Hagen* pointed out that, in contrast to the 1902 Act, the act in *Solem* had not *restored* the lands to the public domain, and, more importantly, a reference in the act to the public domain did not appear in the *operative* language of the statute opening the reservation lands for settlement. 114 S. Ct. at 967.

> indicates that the Act diminished the reservation. Indeed, we have found only one case in which a federal Court of Appeals decided that stautory restoration language did not terminate a reservation, *Ute Indian Tribe,* 773 F.2d at 1092, a conclusion the Tenth Circuit has since disavowed as "unexamined and unsupported." *Pittsburg and Midway Coal Mining Co. v. Yazzie,* 909 F. 2d 1387, 1400, cert. Denied, 498 U.S. 1012, 111 S. Ct. 581, 112 L.Ed.2d 586 (1990).

114 S. Ct. at 967.

Moving on to the issue of which Act—the 1902 Act or the 1905 Act—provided the operative statutory language, the Court held:

> Until the *Ute Indian Tribe* litigation in the Tenth Circuit, every court had decided that the unallotted lands were restored to the public domain pursuant to the terms of the 1902 Act, with the 1905 Act simply extending the time for opening and providing a few details. Petitioner argues, however, that the 1905 Act changed the "manner" in which the lands were to be opened. . . . We disagree, because the baseline intent to diminish the reservation expressed in the 1902 Act survived the passage of the 1905 Act.

114 S. Ct. at 967 (internal citations omitted).

The *Hagen* decision thus knocked both legs out from under the reasoning of *Ute Indian Tribe*. Operative language of restoration to the public domain did in fact indicate Congressional intent to diminish the reservation, and the 1902 Act provided that operative language. Without these two points, there is simply nothing left of *Ute Indian Tribe*. As this court has held in the interval. *Hagen* "effectively overruled the contrary conclusion reached in the *Ute Indian Tribe* case, redefined the Reservation boundaries resulting from our earlier decision, and

conclusively settled the question." *United States v. Cuch*, 79 F. 3d 987 (10th Cir. 1996). The Court of Appeals should therefore recall its opinion and mandate on reconsideration in *Ute Indian Tribe*, leaving the correctly reasoned panel decision as the decision of the Court.

C. *Ute Indian Tribe's Holding Concerning the National Forest Lands and the Uncompahgre Reservation Is No Longer Viable After Hagen.*

Ute Indian Tribe, of course, did not just involve the homesteaded lands of the Uintah Reservation. Each of the three opinions also addressed whether lands added to the Uintah National Forest by the 1905 Act,[14] and the Uncompahgre Reservation to the east, had been stripped of reservation status by Congress. The District Court's 1981 decision had held that while the Uintah Valley Reservation had not been disestablished, the national forest lands and the Uncompahgre Reservation had lost their reservation status and were no longer Indian country. 521 F. Supp. at 1153-1154. The Court of Appeals' panel decision reversed the District Court on the Uintah Reservation, finding that that reservation had in fact been disestablished, but concurred with the District Court on the disestablishment of the forest lands and Uncompahgre. 716 F. 2d at 1315. Finally, the *en banc* opinion in *Ute Indian Tribe*, based upon its conclusion that *Solem* had changed the standard for finding disestablishment, held that none of the three areas had been disestablished, and all remained Indian country for jurisdictional purposes.

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[14] The 1905 Act provided in part: "That before the opening of the Uintah reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest reserves, . . . such portions of the lands within the Uintah reservation as he considers necessary." By proclamation, President Theodore Roosevelt withdrew 1,010,000 acres from the reservation for this purpose. 33 Stat. at 1070.

Perank and *Hagen* by their terms dealt only with the Uintah Reservation. The criminal conduct at issue in those cases took place in Myton, Utah, within lands opened for settlement under the 1902-1905 Acts. The Utah Supreme Court in *State v. Hagen* and *Perank*, and the U.S. Supreme Court in *Hagen*, did not need to address the forest lands and the Uncompahgre Reservation explicitly, and did not do so. In the Memorandum Decision, the District Court concluded that "there exists no direct conflict between *Ute Indian Tribe* and *Hagen, Perank*, or any other case regarding those lands." Aplt. App. Tab L, p. 262. The District Court therefore continued its injunction in effect with regard to those areas, precluding all exercises of state jurisdiction over Indians within the national forest and the Uncompahgre Reservation.

Although *Perank* and *Hagen* did not need to directly address the forest lands and Uncompahgre, there is in fact a direct conflict between the U.S. Supreme Court's decision in *Hagen* and *Ute Indian Tribe*. In *Hagen*, the Supreme Court made two clear holdings. First, statutory language restoring reservation lands to the public domain evidences congressional intent inconsistent with continued reservation status. 114 S. Ct. at 967. Second, the 1902 Act provided the operative language of restoration, with the 1905 Act simply extending the time for opening and providing a few other details. Id.

In *Ute Indian Tribe*, the Court of Appeals found that the national forest and Uncompahgre remained Indian country because, under its mistaken view of *Solem*, congressional restoration language did *not* evidence intent to disestablish, and because it felt that the 1905 Act superseded the 1902 Act in accomplishing the opening of the Uintah Reservation. With regard to the forest lands, Judge Doyle's lead opinion does not even mention the 1902 Act, instead assuming that only the 1905 Act was operative. Judge Seymour's concurring opinion is even clearer in its

reliance on both the mistaken *Solem* analysis and the 1905 statute: "Assuming the Uintah Reservation was never disestablished, nothing in the [1905 Act] amounts to explicit language of cession. . . . The Act merely contemplated the opening of the reservation to non-Indians. . . ." 773 F. 2d at 1099-1100. With *Hagen*'s ruling that the 1902 Act in fact did diminish the reservation, Judge Seymour's assumption fails.

In *Hagen*, the Supreme Court cited as supportive to its conclusions the minutes of Indian Inspector James McLaughlin's discussion with the Tribe in 1903, particularly his statement that "after next year there will be no outside boundary line to this reservation." 114 S.Ct. at 969. Inspector McLaughlin's statement is consistent with then Utah representative George Sutherland's statement that after the opening, it would be a waste of money to survey the outside boundary lines of the reservation, since those boundaries would no longer have relevance. 36 Cong. Rec. 1388 (Jan. 28, 1903), cited at 521 F. Supp. 1122. With the removal of these boundaries, the forest lands were simply not within the boundaries of the reservation.[15] The District Court's extensive historic analysis of the contemporary understanding that the forest lands would have public rather than Indian reservation status, see 521 F. Supp. at 1136-1141, must prevail in these circumstances, where the Court of Appeals' decision was based on the continuing existence of the boundaries.[16]

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[15] This is true even if the District Court's analysis of which fee lands remain Indian country is applied. The District Court held that the boundaries of the reservation were diminished to the boundaries of the individual allotments and the communal grazing reserve. Memorandum Decision at 18-19, Aplt. App. Tab L, pp. 187-188. The forest lands, unlike the grazing reserve, were not set aside for tribal use, and remained outside these diminished boundaries.

[16] Although subsequently silenced by order of the Department of Justice during the *Ute Indian Tribe* litigation, the U.S. Forest Service until that time had taken the formal position that the forest

With regard to the Uncompahgre Reservation, the *Ute Indian Tribe* court once again relied heavily on its belief that *Solem* had held that public domain language alone was insufficient to support disestablishment. 773 F. 2d at 1095. With only this legal conclusion—now determined to have been erroneous—as support, the Court of Appeals disregarded the District Court's detailed historical analysis of overwhelming evidence supporting the historic disestablishment of the Uncompahgre Reservation. See 521 F. Supp. 1100-1111.

One of the clearest statements of the reasons that the Uncompahgre Reservation was in fact terminated when opened by the Act of June 7, 1897, 30 Stat. 62 (the "1897 Act") comes from the United States Solicitor General, in contesting the Ute Tribe's motion to intervene in *Andrus v. Utah*, 446 U.S. 500, 100 S.Ct. 1803, 64 L.Ed. 458 (1980), a dispute over oil shale lands within the reservation:

> [I]n the view of the United States, the Tribe's claim that the Uncompahgre Reservation survives is both erroneous and irrelevant.
>
> The fact is that, for several decades at least, the Department of Interior has considered the Uncompahgre Reservation as disestablished. That remains its view today. Our own review of the evidence affords no basis for disagreeing with that conclusion. Of course, we may be wrong. But the court perhaps may accord some weight to the assessment of government officials who, although not insensitive to their special responsibility to support tribal claims, find themselves unable to do so in this instance.
>
> We simply list some of the impediments to the Tribe's claim: (1) Both in the abortive 1894 Act

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lands were on longer within the reservation. See Aplt. App. Tab T, pp. 328-332.

> and in the 1897 Act, Congress treated the Uncompahgre Reservation as a mere temporary asylum for the Ute Band of that name, denying them any claim to the proceeds derived from the sale of the surplus lands opened to entry; (2) in 1899 and 1903, after the Reservation was opened, it was referred to in legislation as in "the former Uncompahgre Indian reservation"; (3) in 1948, Congress extended the Uintah and Ouray Reservation by including lands situated within the boundaries of the former Uncompahgre Reservation, a futile act if the latter Reservation still subsisted; (4) in the same Act, Congress once again referred to the area as "the former Uncompahgre Indian Reservation" and nothing since 1948 indicates any Congressional change of mind; (5) in 1965, the Ute Tribe obtained a stipulated judgment in the Indian Claims Commission to compensate it for the failure of the United States to provide the Uncompahgre Band with a permanent Reservation; and (6) at no time since 1897 does it appear that the Department of the Interior (or any government agency) has treated the Reservation as still in existence. Perhaps these hurdles can be overcome. But, for us, the historic evidence compels the conclusion that the Uncompahgre Reservation no longer subsists.

Aplt. App. Tab S, pp. 323-325 (internal citations omitted).

After *Ute Indian Tribe*'s determination that the Uncompahgre reservation still existed, the United States asserted to the Supreme Court on the state's petition for certiorari that the Court of Appeals' decision on this point was incorrect:

> In the end, however, the court of appeals' analysis is unconvincing. In our view, the circumstances of the Uncompahgre Reservation contrast with those of the Uintah Reservation and "reveal a widely held,

> contemporaneous understanding" that the reservation would be established by the 1897 Act (*Solem*, 465 U.S. at 471). We therefore adhere to the view expressed in our memorandum . . . in *Andrus v. Utah*, 446 U.S. 500 (1980) . . . that the Uncompahgre Reservation was disestablished in 1897.

Aplt. App., Tab R., pp. 316-319.

D. *Sound Policy Reasons Support Withdrawal of the Mandate Not Only as to the Uintah Reservation, but also as to the Forest Reserve and Uncompahgre.*

The State of Utah is well aware of the prudential policies behind the law of the case doctrine. The case now before the Court, however, presents sufficiently unusual circumstances that departure from the law of the case rule is not only justified by law, but also conducive to judicial economy. As discussed in Section II.A. above, departure from the law of the case is justified where controlling authority has since made a contrary decision of the law applicable to the issues. Indeed, where the Supreme Court has issued a definitive ruling on the issue in the interim, the Court of Appeals may be obligated not to follow the previously established law of the case. *Hull v. Freeman*, 991 F. 2d 86, 90 (3rd Cir. 1993) (rather than follow opinion in prior appeal, Court of Appeals must follow different law established by subsequent Supreme Court decisions); *Colaizzi v. Walker*, 812 F. 2d 304, 310 (7th Cir. 1987).

The *en banc* decision in *Ute Indian Tribe* that the forest lands and uncompahgre had not been disestablished is based upon reasoning that has been completely undercut by the U.S. Supreme Court. Although the Tribe may argue that *Ute Indian Tribe* remains binding upon the State through the doctrine of collateral estoppel, thus preventing the State from exercising jurisdiction over Indians in these areas, it is clear that many cases may arise where the state is not a party. Although the national forest and

the Uncompahgre are sparsely populated, the enormous size of these areas and their substantial natural resources make it inevitable that these issues will surface on judicial dockets again and again. Certainly any Indian criminal defendant charged for conduct in these areas by the Federal Government under the Major Crimes Act, 18 U.S.C. § 1153, will assert the non-reservation status of these lands in light of *Hagen*. The issue will similarly arise in connection with tribal and state taxation, civil torts, and other unforeseeable matters. Were the Tribe's view followed, one rule of law—based upon *Ute Indian Tribe*—would apply to the State of Utah in these areas, while another rule entirely would apply to the federal government and many private parties. This Court now has the opportunity to correct fully its erroneous decision in *Ute Indian Tribe* concerning these areas, and prevent future uncertainty and litigation concerning these lands. By withdrawing its *en banc* mandate, and thus reinstating the original panel decision as the opinion of the Court, it can do so.

III. *THE DISTRICT COURT ERRED IN DETERMINING THAT CERTAIN CLASSES OF FEE LANDS REMAIN IN INDIAN COUNTRY NOTWITHSTANDING DIMINISHMENT OF THE RESERVATION BOUNDARIES.*

A. *Standard of Review.*

The District Court erroneously concluded that certain lands no longer held in trust by the United States for the tribe or individual Indians—most notably former allotments now held in fee simple—remain in Indian Country for jurisdictional purposes. The District Court's conclusion was based upon its determination that Congress' restoration of unallotted lands to the public domain through the 1902-1905 Acts left reservation boundaries diminished but intact around certain lands, including all allotments. The District Court's discussion of this issue is found at

pages 12-48 of the Memorandum Decision, and its ruling is found at page 96. Aplt. App. Tab L., pp. 181-217, 265.

In determining which lands remain within Indian country after the diminshment of the reservation, the Court of Appeals applies a *de novo* standard of review. *Pittsburg & Midway Coal Min. Co. v. Yazzie, supra,* 909 F. 2d at 1393-1394 ("*Yazzie*"). The existence and scope of reservation diminishment "is a matter of statutory construction which typically involves a *de novo* review. *Id.* at 1393.

B. *The District Court's Boundary Ruling.*

In his July 14, 1905 proclamation implementing the opening of the Uintah Reservation, President Theodore Roosevelt implemented Congress' opening of the reservation by declaring "that all the unallotted lands in said reservation . . . will on and after the 28th day of August, 1905 . . . be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States." 34 Stat. 3119-3120. In the years following this proclamation, some 400,000 acres of land permanently left federal ownership through the operation of the homestead and townsite laws, including "cash entry" sales authorized by the 1905 Act. Act of March 3, 1905, *supra,* 33 Stat. at 1070.

The District Court, the United States, and the Ute Tribe all concede that after *Hagen,* former reservation lands that were conveyed into fee ownership through these laws, and which have remained in fee ownership, are as a substantive matter not Indian country under 18 U.S.C. § 1151 (a). However, the District Court held that certain other classes of lands within the former reservation boundaries that have passed out of trust status remain Indian country notwithstanding fee ownership. These lands primarily are comprised of former allotments that have passed into fee simple status, but also include lands granted to Mixed-

Blood Utes pursuant to the Ute Partition Act, 25 U.S.C. §§ 677-677aa, and lands exchanged by the Tribe into fee status in the course of consolidating its landholdings. In contrast, the State believes that within the former Uintah Reservation boundaries, Indian country does not extend beyond the approximately 1.2 million acres of lands actually held in trust by the United States for the tribe and individual Indian allottees.

The District Court's rationale for still including fee lands within Indian country is based upon its conclusion that the relevant Congressional acts had diminished the boundaries of the reservation *only* to the extent of the opening. Mem. Dec. at 90-91. Under this theory, allotments and the tribal grazing reserve lands that were set aside at the time of the opening—none of which were available for non-Indian settlement—remained in formal reservation status, and had defined "boundaries" on a tract by tract basis. Under 18 U.S.C. § 1151(a), land within the limits of a reservation remains Indian country notwithstanding the issuance of a fee patent. The District Court therefore reasoned that since each parcel's limits were in effect reservation limits, the subsequent conveyance of these lands out of trust did not affect their Indian country status under § 1151(a). Mem. Dec. at 19, Aplt. App. Tab L, p. 169.

C. *The Indian Country Statute.*

The starting point of any analysis of what is or is not Indian country is 18 U.S.C. § 1151. As the Tenth Circuit has recently observed, "both the Supreme Court and this court have concluded that § 1151 defines Indian country for both civil and criminal jurisdiction purposes." *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F. 2d 1531, 1540-1541 (10th Cir. 1995). There are three ways that land can be Indian country under the statute. First and foremost, 18 U.S.C. § 1151(a) provides that lands

"within the limits" of an Indian reservation remain "Indian country" notwithstanding the issuance of any patent. This subsection is why reservation disestablishment cases have received so much attention from the Courts—non-Indian lands held in fee simple can be within Indian country for jurisdictional purposes if within the limits (e.g. the boundaries) of a reservation. Under 18 U.S.C. § 1151(b), land within "dependent Indian communities" is also within Indian country. *See generally Blatchford v. Sullivan,* 904 F. 2d 542, 544-549 (10th Cir. 1990). This issue is not now before the Court.[17] Under 18 U.S.C. § 1151(c), Indian country status further extends to "all Indian allotments, *the Indian titles to which have not been extinguished.* . . . " (emphasis added). This statute by its terms does not permit former allotments to be considered Indian country unless one of the other two subsections of § 1151 applies. Finally, the Courts have recognized that there may be tribal lands outside formal reservations, which do not fit exactly within either of the three categories set forth in § 1151. Lands of this type—held by tribes in restricted status or by the United States in trust for a tribe—are Indian country even though outside a reservation. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 511, 111 S. Ct. 905, 910, 112

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[17] The State does not dispute that certain areas within the former Uintah Reservation boundaries may qualify as dependent Indian communities, and thus for Indian country status under 18 U.S.C. § 1151(b). The dependent Indian community issue was deferred at the District Court level by agreement of the parties due to the factual nature of the inquiry involved. The state questions whether the issue is in fact properly before the District Court even upon a remand of this case, since the issue was never set forth in the Tribe's complaint in this action, and to the State's knowledge no pending controversy exists over the dependent Indian community status of any particular area. The State suggests that this issue is probably best resolved by negotiations or on a case by case basis when specific disputes arise, rather than by having the District Court undertake a generalized inquiry into the dependent Indian community status of the entire Uintah basin. See Mem. Dec. at 89.

L. Ed. 2d 1112 (1991); *United States v. John*, 437 U.S. 634, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978).

D. *The District Court Ruling Takes Language In* Hagen *and Perank Out of Context.*

1. The District Court Analysis.

The District Court found that allotments and similar lands maintained in trust at the time the reservation was opened retained reservation status (e.g. not just Indian ownership) by focusing on *Hagen*'s specific holding on the restoration issue:

> [W]e hold that the restoration of unallotted lands to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the act diminished the reservation. . . .

114 S. Ct. at 967 (emphasis added). Similarly, the District Court looked to the Utah Supreme Court's phrasing of the issue in *Perank* as whether "operative stautory language opening a reservation would effect a diminishment of that reservation *as to the lands so restored,*" and its holding that Congress had intended to diminish the Reservation *"as to those lands restored to the public domain."* 858 P. 2d at 934 (emphasis added).

The District Court drew from these statements the conclusion that Congress had not meant to terminate the Uintah Reservation boundaries in their entirety, and that the remaining Reservation would consist not only of scattered individual Indian allotments but also the 250,000 acre grazing reserve that Congress had directed the Secretary of Interior to set aside for common tribal use. Mem. Dec. at 18-19. Since each of these individual reservation parcels would obviously have a property boundary

("limits"), sale of the parcel into fee status would not remove the parcel's Indian country status under § 1151 (a) ("lands within the limits of an Indian reservation notwithstanding the issuance of a fee patent").

2. The Court's Conclusions Are Directly Opposite The Prior Positions of All Involved.

Hagen and *Perank* were decided on the *identical* record used in *Ute Indian Tribe*. Aplt. App. Tab O, pp. 300-303. That record has been stipulated to be the same record now before the Court of Appeals. Pre-trial Order, Aplt. App. Tab J, p. 16. All of the courts that have been involved in the long history of this case have been asked to decide the same jurisdictional issue. The District Court's analysis, finding as it does that the diminishment of the reservation left scattered allotments as § 1151(a) reservation on a tract by tract basis, is directly opposite the position espoused by both the District Court and the Tribe itself throughout these proceedings.

In the initial *Ute Indian Tribe* litigation, the issue was the extent of the *exterior* boundaries of the reservation. 521 F. Supp. at 1075. The Tribe described the issue as an "all or nothing" one; if the District Court ruled against it on the existence of the exterior boundaries, Indian country would be limited to trust lands. Pretrial Memorandum of Ute Indian Tribe Dated July 31, 1979. As noted in Section II, the District Court held that were the 1902 Act to have been the operative statute, the reservation would be terminated. 521 F. Supp. at 1122. *Hagen* of course did find that the 1902 Act was the operative statute.

Even more instructive are the Tribe's statements *after Perank*. In seeking injunctive relief before the District Court, the Tribe asserted that *Perank* "holds that the Uintah Valley Reservation was disestablished, except for those lands which are held in trust by the United States for the benefit of the Tribe" and "would subject tribal members

who commit offenses off trust land to state criminal prosecution." Aplt. App. Tab D, p. 23-25. In *Hagen*, the Tribe had exactly the same understanding of what the Supreme Court was being asked to decide. The Tribe's Motion to Intervene in the Supreme Court proceedings states, *inter alia*:

> This case will determine for all time *the exterior boundaries of the Uintah & Ouray Reservation*. . . . [T]hose boundaries define the geographic parameters of the Tribe's governmental authority. . . .
>
> [T]he Utah Supreme Court held that the Uintah Valley Reservation had been diminished by its opening to settlement, finding that *the Reservation consists only of those lands held in trust by the United States for the Tribe or individual Indians.*
>
> [T]ribal members would, if the Reservation were to be adjudged diminished, be subject to criminal prosecutions in state court for infractions occurring on *non-trust lands of the Reservation.*

Motion of Ute Indian Tribe to Intervene As A Matter of Right, Applt. App. Tab U, pp. 334-337. (Emphasis added). The Tribe's brief as an amicus curiae makes the same point, while the United States has similarly asserted that *Perank* had disestablished the exterior boundaries of the Uintah and Ouray Indian Reservation. Aplt. App. Tab P. P. 305, n. 11; Doc. 10 at 2.

3. Perank and Hagen Did Not Leave Allotments Within The Reservation.

Based upon *Hagen*'s ruling that restoration language would effect a diminshment of the reservation "as to the lands so restored," the District Court concluded that the boundaries were diminished down to individual parcel boundaries around the retained allotments and grazing reserve. The District Court's decision understates the effect of the removal of the historic reservation boundaries by

the restoration of unallotted lands to the public domain. The *Hagen* court clearly contemplated that the exterior boundaries of the reservation would simply be gone; it favorably cited comments by the Department of the Interior's negotiator with the Ute Tribe in connection with the impending allotments, Indian Inspector James McLaughlin, who had explained the situation to the Tribe by stating *"after this year there will be no outside boundary line to this reservation."* 114 S. Ct. at 968 (italics in original). While the District Court correctly notes that Inspector McLaughlin went on to state that each individual allotment would have an outside boundary, it does not follow that these parcel boundaries can be equated with "reservation" boundaries for the purposes of § 1151(a).[18]

Where a reservation has been diminished, unallotted lands within the former reservation boundary lose their status as "Indian Country." In *United States v. Pelican*, 232 U.S. 442, 34 S. Ct. 396 (1914), the Supreme Court stated:

> [T]he original reservation was Indian Country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government. The same considerations, in substance, apply to the allotted lands which, when the reservation was diminished, were excepted from the portion restored to the public domain.

34 S. Ct. at 399. In other words, after diminishment trust allotments within the former reservation remain Indian Country because they are set aside for use by individual Indians. However, this status continues *only during the period that the allotments are held in trust.* 34 S. Ct. at 399.

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[18] In fact, the petitioner in *Hagen* expressly discounted this notion, stating: "the reference to individual boundaries replacing the outside boundary was not, as in *Rosebud*, to describe the new shape, size and location of the Reservation." Aplt. App. Tab Q p. 309.

The Tenth Circuit's *Yazzie* decision, *supra,* 909 F. 2d 1387, deals with the precise issue addressed by the District Court here:

> A question remains as to the current status of the *allotted* lands. Were they terminated from reservation status when the unallotted lands were restored to the public domain, or did they retain reservation status? Arguably, since only the unallotted lands were restored, the allotted lands remain unrestored, i.e. retain their reservation status. On the other hand, the allotted lands could not have been restored to the public domain for title purposes because they were allotted in severalty and had been disposed of; i.e. since they were no longer public lands, they obviously could not be restored for sale and settlement purposes.

909 F. 2d at 1420. *Yazzie* court reached the exact opposite conclusion as the District Court here with regard to the reservation status of retained allotments once surrounding lands were restored to the public domain; after restoration "[i]t does not hold that the remaining allotments are reservation; instead, they are Indian country by virtue of being allotments under 18 U.S.C. § 1151(c). 909 F. 2d at 1421.

Yazzie is directly applicable here. Congress diminished the Uintah Valley Reservation by restoring it to the public domain. With the removal of the former exterior boundaries, allotments have not been and are not now "within the limits" of a reservation. *See* 18 *U.S.C.* § 1151(a). Existing trust allotments remain Indian country under § 1151(c), but once Indian title to an allotment is extinguished, the parcel is no longer "Indian Country". This interpretation is supported by the language of § 1151(c) itself, which includes "all Indian allotments, *the Indian titles to which have not been extinguished* . . ." (emphasis added). See *United States v. Pelican, supra,* 34 S. Ct. at 399 (allotted lands retain Indian character for jurisdic-

tion purposes "during the trust period"); see also *United States v. A Juvenile*, 453 F. Supp. 1171 (D. S.D. 1978).

The District Court attempted to distinguish *Yazzie* by several arguments, none of which is ultimately convincing. First, it pointed to Congress' provision at the opening of 250,000 acres of communal grazing lands for use by tribal members as evidence that the reservation was not terminated. The retention of the grazing reserve, even were it a "reservation" has no bearing on the allotments. There is no evidence that the scattered allotments granted to tribal members were inside the upland grazing lands that made up the grazing reserve. See 521 F. Supp. at 1125, n.163. As in *Yazzie*, there was no reservation boundary surrounding them once the historic boundary was removed, eliminating § 1151(a) as a source of jurisdiction. See also *Indian Country U.S.A. v. Oklahoma Tax Comm'n.*, 829 F. 2d 967, 975 n. 3 (10th Cir. 1987) (non-Indian lands remain Indian country under § 1151(a) until the surrounding portion of the reservation is disestablished). Second, the fact that *Yazzie* was remanded to determine the Indian country status of the subject lands under 18 U.S.C. §§ 1151(b) or (c) supports the State's position here; the issue before the Court is whether § 1151(a) applies. Finally, the District Court makes an erroneous and misleading analogy to the diminishment of the Rosebud reservation, citing *Beardslee v. United States*, 541 F. 2d 705 (8th Cir. 1976). The District Court cites *Beardslee* for the proposition that a former allotment within a diminished reservation remains Indian country under § 1151(a). Mem. Dec. at 34-34, Aplt. App. Tab L, pp. 203-204. In fact, in *Beardslee* the court's holding was based upon the fact that the historic reservation boundaries there had *not* been disestablished. For those portions of the Rosebud Reservation where, as here, the exterior boundaries had been diminished, the Supreme Court has come to the opposite conclusion as the District Court here. In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S. Ct.

1361 (1977), the dissent argued that Indians residing in the opened area would be subject to all otherwise applicable state laws, rather than tribal law. 97 S. Ct. at 1385. The majority opinion rebutted this claim by noting that this would not be true *to the extent tribal members were residing on allotment,* because those allotments, although outside the diminished reservation, were Indian country under 18 U.S.C. § 1151. 97 S. Ct. at 1377, n.48. This is a clear indication that within a diminished reservation, as here, Indian country status is based upon current Indian title (e.g. § 1151(c)), rather than the boundaries of particular parcels.

The District Court's analysis also rests upon the belief that the State of Utah is arguing that the Uintah Reservation has been terminated. That is not the case. Although the state believes that the historic boundaries of the reservation were eliminated, it does not dispute that as a practical matter, the reservation remained. At the time of the opening, Congress set aside not only the 250,000 acre communal grazing reserve, but also lands for the federal Indian agency, and similar lands. See 521 F. Supp. at 1125 n. 163. These lands have commonly been referred to as the reservation, but they remain as Indian country not because they are "within the limits of a reservation" under § 1151(a), but rather because they have been set aside by the United States in trust for the Tribe. See *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* supra. Judge Seth's dissent to the *en banc* decision in *Ute Indian Tribe* correctly recognized this to be the case. 773 F. 2d at 1105.

4. The District Court Approach Would Require Tractbook Searches For All Activities Involving Fee Lands In The Entire Uintah Basin.

The District Court also concluded that its application of § 1151(a) to former allotments would serve to lessen the burden on governmental and law enforcement agencies

caused by "checkerboarding" of jurisdictional boundaries. In this the Court is incorrect. For more than eighty years prior to *Ute Indian Tribe,* jurisdiction was based upon the status of particular lands as either trust lands, a well understood and easily made determination generally not requiring a tractbook search. Under the court's approach, a determination that a particular crime or event took place on fee lands anywhere within the former boundaries would *inevitably* require a tractbook search, since the court finds that jurisdiction follows how the land was originally patented, rather than its easily determined Indian status. The delineation of Indian country by trust/non-trust status is not only the correct legal standard, it is by far the simplest method of resolving jurisdictional boundaries in the aftermath of *Hagen.*

CONCLUSION

In *Hagen,* the United States Supreme Court held that Congress diminished the Uintah Reservation by means of the 1902-1905 Acts. As the Ute Tribe repeatedly stated in that case, a finding by the Supreme Court that Congress had diminished the reservation necessarily meant that its jurisdictional powers were limited to trust lands. The Supreme Court has so decided.

Notwithstanding the Supreme Court's clear and final resolution of the jurisdictional issue, the District Court has indefinitely enjoined the State of Utah from asserting jurisdiction within the expansive historic boundaries set by this Court in the *en banc* decision in *Ute Indian Tribe.* The injunction continues even though the District Court has itself recognized that large portions of the lands in question are *not* Indian country, because the District Court believes itself bound by the mandate in *Ute Indian Tribe.* Yet after *Hagen,* the *Ute Indian Tribe* case has been (as this Court has itself said in *Cuch*) "effectively overruled." The Court of Appeals' rulings in *Ute Indian Tribe* on the jurisdictional status of the Uintah Reservation, the Forest

Reserve, and the Uncompahgre Reservation rested upon the premises that statutory restoration language did not strip lands of reservation status, and that the 1902 Act did not provide the operative means of opening the Uintah Reservation. Both premises were expressly rejected in *Hagen*. Because the *en banc* decision in *Ute Indian Tribe* is no longer viable as to any issues decided therein, the Court of Appeals should:

1. Recall the *en banc* mandate in *Ute Indian Tribe* and substitute as the mandate of the Court of Appeals the correctly decided initial panel decision in that case;

2. Reverse the District Court's decision to continue the Injunction Order in effect outside lands held in trust by the United States for the tribe and individual tribal members; and

3. Remand the case to the District Court with directions to dismiss the Tribe's Motion for Permanent Injunctive Relief with prejudice, and to grant the State and Local Defendant's Motion to Dissolve the Injunction Order.

REQUEST FOR ORAL ARGUMENT

The State of Utah requests oral argument in this appeal. This case has a complicated procedural history which oral argument may help illuminate, and involves important public issues. In its Motion for Recall of the mandate in *Ute Indian Tribe*, the State of Utah has suggested that the Court consider this matter *in banc*, since the *Ute Indian* Tribe case was decided by the Court of Appeals sitting *in banc*.

DATED this 17th day of June, 1996.

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APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 96-4073

UTE INDIAN TRIBE of the Uintah and Ouray Reservation, Utah,
Plaintiff/Appellee,

v.

STATE OF UTAH; DUCHESNE COUNTY, a political subdivision of the State of Utah; UINTAH COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; and DUCHESNE CITY, a municipal corporation,
Defendants/Appellants,

UNITED STATES OF AMERICA,
Amicus Curiae.

APPELLANT STATE OF UTAH'S MOTION FOR ADDITIONAL TIME FOR ORAL ARGUMENT

Appellant State of Utah hereby moves the Court for an additional fifteen (15) minutes of Oral Argument time in this matter (which is set for Tuesday, September 10, 1996), based on the following grounds:

1. This case raises complex issues of exceptional importance to the State of Utah and additional argument time is necessary to fully apprise the Court in this matter.

2. This case involves a long procedural history, culminating in a Mandate of the United States Supreme Court

which is now the issue here. The resolution of this case will have long-term ramifications to the extent of federal, tribal, state and local jurisdiction in the eastern part of Utah.

3. This case is before the Court not only on appeal from the lower court, but also on the State's motion to have this Court reconsider and recall its previously-issued Mandate in *Ute Indian Tribe v. State of Utah, et al.*, 773 F.2d 1087 (10th Cir. 1985) (*en banc*) cert. denied, 479 U.S. 994 (1986).

4. Because this case is the last matter scheduled to be heard on September 10, 1996, the requested additional time will not unduly disrupt the Court's calendar.

Counsel for Appellee Ute Indian Tribe was contacted regarding this request for additional time, and Appellee Ute Indian Tribe is opposed to the granting of any additional time for Oral Argument; nevertheless, we believe such additional time will benefit the Court.

Therefore, Appellant State of Utah respectfully requests that an additional fifteen minutes of Oral Argument time (for a total of thirty minutes per side) be granted.

Respectfully submitted this 29th day of August, 1996.

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APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
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No. 96-4073

UTE INDIAN TRIBE of the Uintah
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STATE OF UTAH; DUCHESNE COUNTY, a political subdivision of the State of Utah; UINTAH COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; and DUCHESNE CITY, a municipal corporation,
Defendants/Appellants,

UNITED STATES OF AMERICA,
Amicus Curiae.

(Oral Argument Scheduled On)
Tuesday, September 10, 1996)

On Appeal from the United States District Court
for the District of Utah,
Honorable Bruce S. Jenkins, Senior Judge

REPLY BRIEF OF APPELLANT
STATE OF UTAH

I.

INTRODUCTION

The State of Utah is before the Court of Appeals seeking implementation of the U.S. Supreme Court's decision in *Hagen v. Utah*, 510 U.S. 399, 114 S. Ct. 958, 127 L. Ed. 2d 252 (1994) ("*Hagen*"), and withdrawal of this Court's inconsistent mandate in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. den. 479 U.S. 994 (1986) ("*Ute Indian Tribe*"). The District Court, while recognizing the direct conflict between the Supreme Court's definitive ruling and *Ute Indian Tribe*, has continued for over two years to enjoin the State from exercising governmental authority over three million acres of non-Indian lands on the basis of the latter, now discredited, decision.

The Ute Indian Tribe seeks to make the District Court's injunction permanent. The State would be prevented prospectively and indefinitely from undertaking any criminal prosecutions of Indians (or exercising civil jurisdiction over a broad range of activities conceivably affecting Indians) on non-Indian lands within the vast original boundaries of the Uintah and Uncompahgre Reservations, an area populated overwhelmingly by non-Indians.

The Tribe's position, based upon the purported collateral estoppel effects of *Ute Indian Tribe*, is simple: "the Supreme Court's rule in *Hagen* is of no relevance to the resolution of the issues before this Court." Corrected Brief of Appellee Ute Indian Tribe ("Ute Tribe Brief") at 34. The State of Utah respectfully disagrees. The Supreme Court has "effectively overruled" *Ute Indian Tribe*, and that case does not provide a basis for continuing to enjoin the State and its subdivisions from the legitimate exercise of jurisdictional authority on non-Indian lands within the former reservation boundaries.

The Tribe's brief neglects two crucial consequences of the Tribe's position. First, this Court has held that after *Hagen* the United States does not have jurisdiction to prosecute Indians within the diminished Uintah Reservation, because those lands are not "Indian country" under 18 U.S.C. § 1151. *United States v. Cuch,* 79 F. 3d 987 (10th Cir. 1996), *cert. pending.* ("*Cuch*"). The United States, in its brief amicus curiae in this proceeding, similarly indicates that the Uncompahgre Reservation was disestablished and thus is not in its view Indian country. If the State of Utah is enjoined from exercising jurisdiction over non-Indian lands where the United States has no statutory authority to act, there will be vast areas of Utah where no sovereign may prosecute Indian felonies.

Second, the Tribe indulges in the fiction that simply disregarding *Hagen* and maintaining *Ute Indian Tribe* in place between the parties will mean an end to the dispute over what is and is not Indian Country. In fact, this issue arises in varied contexts unrelated to the *state's* exercise of jurisdiction, including civil torts, federal prosecutions under the Major Crimes Act,[1] tribal taxation, and tribal environmental regulation off tribal lands. *Hagen* provides a rule of decision in these cases directly opposite in both reasoning and conclusion to every aspect of *Ute Indian Tribe.* Even were the Court of Appeals to accept the Tribe's convoluted procedural argument that the State of Utah is collaterally estopped from relying upon *Hagen,* the Court would be faced with the substantive jurisdictional issue again and again until it ruled on the merits as to both the Uintah and Uncompahgre Reservations. In this situation, withdrawal of the entire mandate in *Ute Indian Tribe* is both legally justified and conducive to justice and judicial economy.

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[1] 18 U.S.C. § 1153.

II.

PROCEDURAL ISSUES

A. *The True Issue Before the Court Is Whether the Mandate In Ute Indian Tribe Should Be Recalled Rather than Res Judicata.*

The Tribe devotes 24 pages of argument to its claim that the State of Utah is barred by principles of res judicata from relitigating the reservation boundary issues decided in *Ute Indian Tribe*. The Court of Appeals need not even reach the res judicata issue.[2] The District Court recognized the fundamental incompatibility between the *Ute Indian Tribe* decision and *Hagen*, and invited the Court of Appeals to recall its mandate in the former case for reconsideration. Aplt. App. Tab L, p. 269. Concurrently with this appeal, the State of Utah has moved pursuant to Fed. R. App. P. 27 for withdrawal of the *Ute Indian Tribe* mandate and its replacement with the correctly decided original panel decision in this case. *See Ute Indian Tribe v. State of Utah*, 716 F. 2d 1298 (10th

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[2] The Tribe devotes a substantial part of its argument to discussion of *Federated Department Stores v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed. 103 (1981). The Tribe contends that *Moitie* conclusively establishes that neither a subsequent change of law nor public policy considerations will ever permit a Court to depart from a prior judgment. *Moitie* notwithstanding, federal courts have continued to hold that application of res judicata is a discretionary doctrine, and that changes of controlling law make application of res judicata inappropriate. *FLRA v. U.S. Dept. of the Treasury*, 884 F. 2d 1446, 1456 (D.C. Cir. 1989). Similarly, in *State v. Perank*, 858 P. 2d 927 (Utah 1992), the Utah Supreme Court noted that even were res judicata applicable against the State, it would exercise its unquestioned discretion to address the diminishment issue, because of the public interest in resolving the issue once and for all. 858 P. 2d at 931, n.3. Finally, the Tribe's res judicata arguments fail to state that it is seeking prospective relief in the form of a permanent injunction, a situation where preclusion principles have limited utility. See Section II.D.

Cir. 1983).[3] If the Court of Appeals modifies the *Ute Indian Tribe* mandate, then the prior mandate would, of course, lose any res judicata effect that it might otherwise have. This case accordingly hinges not on res judicata principles, but on the law of the case doctrine.

B. *The Supreme Court's Intervening Decision In Hagen Requires the Court to Withdraw the Mandate In Ute Indian Tribe.*

The Court of Appeals has the inherent power to recall a prior mandate where controlling law has since made a contrary decision of the law applicable to the issues at bar. *Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F. 3d 1531, 1536 n. 4 (10th Cir. 1995). In its principal brief, the State cited authority for the proposition that where the Supreme Court has issued an intervening decision contrary to the prior appellate mandate, that mandate must give way. Brief of Appellant State of Utah ("State Brief") at 24-25, citing *EEOC v. K-Mart Corp.,* 796 F. 2d 139, 146 (6th Cir. 1986); *Higgins v. California Prune & Apricot Growers,* 3 F. 2d 896, 987-898 (2d Cir. 1924).

The Tribe attempts to distinguish these cases by their procedural posture at the time of the intervening Supreme Court decision, noting that in both cases the Supreme Court decision came while the case was on remand to the District Court from an initial appeal and therefore not final. Ute Tribe Brief at 31, n. 20. The Tribe argues that there was a final judgment in *Ute Indian Tribe* once certiorari was denied by the Supreme Court, and that the finality of the judgment precludes the Court of Appeals from reconsidering its mandate in later proceedings in the same case. *Id.* This distinction is not valid. The Tenth

[3] The United States, in its brief as *amicus curiae,* has similarly suggested the partial withdrawal and modification of the mandate, although it disagrees with the State on the extent of the modification.

Circuit has granted relief from a prior and final judgment where relevant case law has been changed by the U.S. Supreme Court in the interval. *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F. 2d 696, 702 (10th Cir. 1989) ("In this circuit, a change in relevant case law by the United States Supreme Court warrants relief under Fed. R. Civ. P. 60(b)(6)"); *Pierce v. Cook & Co.*, 518 F. 2d 720, 722-24 (10th Cir. 1975), *cert. denied* 423 U.S. 1079, 96 S. Ct. 866, 47 L. Ed. 2d 89 (1976); *see also Minnis v. U.S. Department of Agriculture*, 737 F. 2d 784, 786 n. 1 (9th Cir. 1984) (final judgment in prior action with full mutuality of parties given no effect in light of intervening Supreme Court decision).

C. *Full Withdrawal of the Mandate Is Justified Here.*

The true issue before the Court of Appeals is not the finality of the *Ute Indian Tribe* decision. It is instead whether, in light of *Hagen*, the circumstances of this case merit withdrawal of the *Ute Indian Tribe* mandate. Those circumstances include the following:

(1) The U.S. Supreme Court decided the reservation disestablishment issue in *Hagen* on the *identical* record used in *Ute Indian Tribe*, notwithstanding the Tribe's incredible contention that the cases are unrelated. See Aplt. App. Tab O.

(2) The Supreme Court in *Hagen* expressly repudiated the reasoning used by the Tenth Circuit to find no diminishment in *Ute Indian Tribe*, not only with regard to the Uintah reservation but also with regard to the forest lands and the former Uncompahgre reservation. The Tribe is seeking permanent injunctive relief for all three areas, a drastic remedy which merits full examination by the Court of Appeals concerning the continuing viability of *Ute Indian Tribe*.

(3) The jurisdiction of the United States to prosecute Indian crimes is dependent upon whether the

lands in question are Indian country under 18 U.S.C. § 1151. Indian country status must be proven by the United States as a jurisdictional predicate of a federal Indian prosecution. *United States v. Torres*, 733 F. 2d 449 (7th Cir. 1984), *cert. denied* 469 U.S. 864, 105 S. Ct. 204. This Court implicitly held in *Cuch* that the United States could not undertake such prosecutions in the areas disputed here. Where Indian Country status is clearly not present (the diminished Uintah) or has been disavowed by the U.S. (the Uncompahgre) a jurisdictional vacuum could well be created.

(4) The issues are of substantial public importance, which will arise time and again in a multiplicity of contexts unless now resolved by the Court. See Brief for the United States as Amicus Curiae (the "United States Brief") at 11, n. 8 (where issues of public importance that touch on continuing conduct are involved, recall of mandate is justified).

The State submits that these circumstances are sufficiently extraordinary that reconsideration of the mandate is an appropriate remedy.

D. *The Tribe's Requested Remedy—Permanent Injunctive Relief—Is Inappropriate Where Applicable Law Has Changed.*

This appeal is from the District Court's decision to continue the existing injunction prohibiting—with limited exceptions—the State from exercising criminal and civil jurisdiction over Indians anywhere within the expansive *Ute Indian Tribe* boundaries, pending this Court's decision concerning the mandate. The Tribe seeks to make this injunction permanent, and to broaden its scope to preclude state felony prosecutions of Indians within the historic reservation boundaries. Ute Tribe Brief at 50. In seeking this prospective relief, the Tribe goes as far as asking the Court of Appeals to order the Utah Supreme

Court to withdraw its remittitur in *Hagen*, notwithstanding the U.S. Supreme Court's affirmance of the Utah court in that case. Ute Tribe Brief at 18.

The Tribe relies upon the "finality" of the *Ute Indian Tribe* judgment, claiming that that judgment collaterally estops the State from applying *Hagen* to the State's relationships with the Tribe and its members. Ute Tribe Brief at 14. The Tribe goes on to argue that *Hagen* cannot be applied "retroactively" to govern the relationship between the State and the Tribe. Ute Tribe Brief at 29-31. Although the Tribe's reliance upon the collateral estoppel effects of *Ute Indian Tribe* is misplaced, for reasons discussed elsewhere in the State's principal brief and this filing, the Tribe's arguments have a more serious flaw. The Tribe is seeking prospective relief—a permanent injunction preventing the future exercise of jurisdiction by the State and its subdivisions within the historic reservation boundaries. Whatever the merits of the Tribe's collateral estoppel claims, using a now "effectively overruled" decision as the basis for permanent federal court supervision into the indefinite future cannot be justified.

The Supreme Court has recognized that in cases where future injunctive relief is involved, "[a] balance must be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances." *System Federation No. 91 v. Wright*, 364 U.S. 642, 647-48, 81 S. Ct. 368, 371, 5 L. Ed. 2d 349 (1961). A change in law may require modification of an existing injunction. *Id.* Where the legal basis for an existing injunction has disappeared, it is an abuse of discretion for the District Court to refuse to lift the injunction. *Cablevision of Texas v. Oklahoma Western Telephone Company*, 993 F.2d 208 (10th Cir. 1993); *American Horse Protection Ass'n v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982) ("When a change in the law authorizes what had previously been forbidden it is abuse of discretion for a court to refuse to modify an injunction founded on the superseded law").

The State does not seek to "retroactively" apply *Hagen*, in that it does not seek to disturb actions that took place in reliance upon *Ute Indian Tribe*. The Tenth Circuit took this position when it chose in *Cuch* not to invalidate federal criminal convictions of Indians in areas determined by *Hagen* to be outside Indian country. Similarly, the State will not seek to disturb actions taken while the District Court's injunction has been in place, a concern raised by the United States. *See* United States Brief at 13, n. 10. Instead, the State of Utah believes that *Hagen* must be given prospective effect, in the form of an order withdrawing the *Ute Indian Tribe* mandate, and denying the Tribe's request for permanent injunctive relief based thereon.

E. *The Tribe Has "Opened the Door" To A Reconsideration of the Entire Ute Indian Tribe Mandate, Because It Seeks Permanent Injunctive Relief In All Areas Addressed By That Decision.*

The Tribe seeks to have the Court of Appeals enter an Order permanently enjoining the State from exercising jurisdiction inconsistent with the *Ute Indian Tribe* decision, not only with regard to the interior Uintah Reservation, but also the national forest lands and the former Uncompahgre reservation. As noted above, the grant of prospective injunctive relief must be based upon current rather than superseded law. While *Hagen* did not directly rule upon the Indian Country status of the National Forest and the Uncompahgre, it did completely reject the rationale employed by the *Ute Indian Tribe* court in concluding that those areas remained Indian Country. *See* State Brief at 32-38. Since the Tribe seeks to have the Court of Appeals decide whether the State will prospectively be enjoined from exercising jurisdiction in these areas, it is entirely appropriate for the Court of Appeals to determine whether *Ute Indian Tribe* remains good law, irrespective of its prior mandate.

F. *Withdrawal of the Ute Indian Tribe Mandate Would Not Endanger Other Settled Decisions Concerning the Status of Existing Reservations.*

The Tribe argues that, if its res judicata arguments are not accepted, the reservation status of any Indian reservation could be relitigated at will. Ute Tribe Brief at 27. This fear is not well founded. The State seeks the withdrawal of the mandate in *Ute Indian Tribe* because it believes that that case was incorrectly decided, and in particular because the opinion relied almost wholly on the mistaken conclusion that *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161 (1984) ("*Solem*"), changed the law of reservation disestablishment by minimizing the effect of statutory language restoring reservation lands to the public domain. This Court recognized in *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400, cert. denied 498 U.S. 1012 (1990) that *Ute Indian Tribe* was "unexamined and unsupported in the opinion." The *Hagen* court similarly noted that *Ute Indian Tribe* was unique in its erroneous conclusion on the restoration issue. 114 S.Ct. at 967.

Hagen did not change the larger law of reservation disestablishment; rather, it corrected an erroneous decision by a lower court. In effect, the State is not seeking to apply new principles of law here, but to apply existing principles that were wrongly interpreted in *Ute Indian Tribe*. This effort does not endanger judicial determinations as to other reservations made under applicable principles of disestablishment jurisprudence.

III.

NON-INDIAN LAND WITHIN THE FORMER RESERVATION BOUNDARIES DO NOT CONSTITUTE INDIAN COUNTRY

A. *The Indian Country Statute Is Controlling.*

Within the former Uintah Reservation, the primary issue before the Court of Appeals is what non-Indian (i.e. fee) lands are nonetheless Indian country under 18 U.S.C. § 1151. *See Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir. 1993) (primary definition of Indian country is 18 U.S.C. § 1151). Under this statute, the *only* relevant way that lands not held in trust by the United States for the Tribe or individual Indian allottees can be considered Indian country is if they are "within the limits of any Indian reservation". 18 U.S.C. § 1151(a). The State has always contended that, with the elimination of the exterior boundaries of the reservation in 1905, fee lands cannot be considered Indian country, and tribal jurisdiction is coextensive with trust status.

Aside from its collateral estoppel arguments, the Tribe concedes that non-trust "fee" lands that were homesteaded or purchased when the Uintah Reservation was opened in 1905 are no longer Indian country, unless subsequently reacquired by the Tribe and placed in trust. Ute Tribe Brief at 39-40. The United States concurs in the view that such lands are not Indian country. United States Brief at 12-13. These concessions of necessity mean that such lands are not "within the limits" of a reservation pursuant to § 1151(a). Yet the Tribe goes on to make the completely incompatible argument that other fee lands within the former reservation boundaries are in fact "within the limits" of the reservation by virtue of *how* the lands left trust status.[4]

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[4] Certain lands allotted to individual tribal members upon the opening of the Uintah reservation have over the years passed out

The Tribe's argument focuses on the narrow language of the respective holdings in *State v. Perank*, 858 P.2d 927 (Utah 1992) ("*Perank*") and *Hagen*. In *Perank*, the Utah Supreme Court held that language in the 1902 Act[5] restoring reservation lands to the public domain terminated reservation status as to those lands restored. 858 P.2d at 934. In *Hagen*, the U.S. Supreme Court held that the restoration of unallotted reservation lands to the public domain evidenced congressional intent with respect to those lands inconsistent with continued reservation status. 510 U.S. at 414, 114 S. Ct. at 967. The Tribe claims that these holdings limit the effect of the diminishment to restored lands, effectively plucking them from the reservation, while leaving the external boundaries intact. Ute Tribe Brief at 43. Thus, when other former trust lands—primarily Indian allotments that have been conveyed into fee ownership—left trust status, the lands would still be "within the limits" of a reservation, and Indian Country under § 1151(a).

The Tribe's argument, while correctly stating the holding in *Perank* and *Hagen*, disregards the primary *consequence* of restoring all unallotted lands to the public domain—that the exterior boundaries of the Uintah reservation no longer existed. This in turn leads to the conclusion that fee lands, however leaving trust status, are no longer "within the limits" of a reservation, a necessary prerequisite to Indian country status. The Supreme Court clearly recognized that the exterior boundaries of the Uintah reservation no longer had any legal significance once the Reservation had been opened. The Court

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of trust status, and are now held in fee simple. The Tribe has also sold or exchanged other former trust lands, with the result that the conveyed lands passed into fee simple. Finally, the Tribe conveyed certain former trust lands to Mixed-Blood Utes in fee simple pursuant to the Ute Partition Act, 25 U.S.C. §§ 677-677aa. It is these fee simple lands that the Tribe contends are somehow still "within the limits" of a reservation.

[5] Act of May 27, 1902, 32 Stat. 263.

cited approvingly to the contemporary understanding, reflected in the minutes taken by Indian Inspector James McLaughlin, that "*after next year there will be no outside boundary line to this reservation.*" 510 U.S. at 417, 114 S. Ct. at 968. Without outside boundary lines, there is no basis for the Tribe's assertion that non-Indian lands are "within the limits" of a reservation, a necessity for a finding that such lands are Indian country under § 1151(a).

B. *The Tribe's Inconsistent Prior Position Exposes The Flaws In Its Reasoning Here.*

Both the State and the local appellants have pointed out the Tribe's multiple statements to various courts that, if *Perank* and *Hagen* were decided against it, tribal jurisdiction would be coextensive with trust lands. State Brief at 43-44; Brief of Duchesne County at 19-33. The Tribe's brief conveniently fails to distinguish or even mention these statements, which of course are utterly inconsistent with its current assertion of jurisdiction over non-trust fee lands. What the Court of Appeals should note is that the very same holding in *Perank* that the Tribe now claims is limited to opened lands was addressed fully by the Tribe both before the District Court and the Supreme Court. In seeking injunctive relief before the District Court, the Tribe asserted that *Perank* "holds that the Uintah Valley Reservation was disestablished, except for those lands which are held in trust by the United States for the benefit of the Tribe" and "would subject tribal members who commit offenses off trust land to state criminal prosecution." Aplt. App. Tab D, p. 23-25. In *Hagen*, the Tribe similarly stated:

> This case will determine for all time *the exterior boundaries of the Uintah & Ouray Reservation* . . . . [T]hose boundaries define the geographic parameters of the Tribe's governmental authority . . . .

and

> [T]he Utah Supreme Court held that the Uintah Valley Reservation had been diminished by its opening to settlement, finding that *the Reservation consists only of those lands held in trust by the United States for the Tribe or individual Indians.*

Aplt. App. Tab U, pp. 334-337.

This is the same position taken by the District Court in its 1981 opinion, in which it stated that if the 1902 Act had been the operative statute (which *Hagen* held to have been the case), the reservation would have been terminated. *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1122. The District Court viewed the jurisdictional question before it as being one of trust vs. non-trust lands. 521 F. Supp. at 1079. To claim that *Hagen* and *Perank* —decided on the identical record as *Ute Indian Tribe*— were somehow deciding a different issue is disingenuous and contrary to all prior claims of the parties.

C. *The United States' Position Also Erroneously Assumes the Exterior Boundaries Remain Intact.*

The United States also completely fails to address the core issue of the exterior boundaries of the reservation. Although it told the U.S. Supreme Court that *Perank* had *disestablished* the exterior boundaries of the Uintah Reservation,[6] the United States brief before this court says nothing about the exterior boundaries, instead stating that *Hagen* merely removed opened lands from the reservation. This is a crucial omission, because the "limits" of the reservation are what determine Indian country. Being charitable to the United States, it can be assumed that it adopts the Tribe's position that Congress had simply excised the opened lands from the reservation, while leav-

[6] See Brief of Appellant Duchesne County at 22,26. Duchesne County's Brief primarily addresses issues involving fee lands and the national forest lands, while the Brief of its co-appellant Uintah County addresses the Uncompahgre issue.

ing the historic boundaries otherwise intact. Yet this position is incompatible both with *Hagen* ("there will be no outside boundary line to this reservation") and the United States' argument to the Supreme Court that *Perank* had disestablished the exterior boundaries.

It is important for the Court of Appeals to note that the position of both the Tribe and the United States is essentially incompatible with that taken by the District Court in its Memorandum Decision. The District Court observed that the historic exterior boundaries of the Uintah Reservation simply no longer existed, but held that those boundaries had been diminished to the individual perimeters of the communal tribal grazing reserve and related lands, as well as to the boundaries of individual allotments. Memorandum Decision at 18-20. Under the District Court's analysis, those individual boundaries form the "limits" of the reservation for purposes of § 1151(a).

Although the State disagrees with the District Court's ultimate conclusion,[7] the District Court's opinion at least recognizes that § 1151 is the controlling authority here, and that the exterior boundaries no longer exist. The United States' analysis simply ignores its own statements regarding *Perank* and the clear language of *Hagen* that

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[7] The District Court's analysis—that when the exterior boundaries were done away with, the reservation boundaries shrank to the tract boundaries or multiple individual parcels—is unsupported by any disestablishment case. The State does not contest that these lands, when still in trust, are Indian country. Where the parcels were communal, e.g. the tribal grazing reserve, the lands are Indian country even though not specifically within § 1151. *See Buzzard v. Oklahoma Tax Comm'n, supra*, 992 F. 2d at 1076 (Supreme Court has recognized that land "validly set apart" for Indians may be Indian country even if § 1151 inapplicable). For allotments, the parcels are Indian country under § 1151(c) so long as trust status continues. Yet in both cases, once trust status ends, Indian country status ceases. This position is entirely consistent with the prior positions of the District Court, the Tribe, and the United States.

the historic reservation boundaries have no further relevance.

D. *The United States' Analysis Is Flawed With Regard to Former Allotments.*

A substantial portion of the disputed fee lands are former allotments that over the years have passed into fee status, and are no longer held in trust by the United States for tribal members. Former allotments are expressly addressed in 18 U.S.C. § 1151(c), which provides that Indian Country status extends to Indian allotments, "the Indian titles to which have not been extinguished." The former allotments in dispute here have had their Indian titles extinguished, so they cannot be considered Indian country under § 1151(c). Thus, only if such former allotments are "within the limits" of a reservation under § 1151(a) can they be considered Indian country.

The United States argues that former allotments in the Uintah Reservation have Indian country status under § 1151(a), because *Hagen* simply removed opened lands from the existing reservation—in other words that the historic boundaries remain with some excisions, keeping allotments within the limits of the reservation. Yet if the Court of Appeals recognizes *Hagen*'s actual conclusion that the historic boundaries are gone, it will reach the decision that the scattered individual allotments are therefore outside any remaining reservation boundaries. As long as those allotments stay in trust status, they are Indian country under § 1151(c), but once their Indian title is extinguished, they become subject to state jurisdiction. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S. Ct. 1361, 1377 n. 48 (1997) (allotments outside diminished but still existing reservation boundaries are Indian country by virtue of trust status).[8]

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[8] The United States cites the State's Petition for Writ of Certiorari in *Ute Indian Tribe*, in which the State agreed that remain-

E. *The Court of Appeals Should Determine The Indian Country Status of the Forest Lands.*

The Tribe does not address the substantive issue of whether the former tribal lands added to the Uinta Forest Reserve (now the Uinta and Ashley National Forests) by the 1905 Act [9] were in fact removed from the Reservation. Rather, the Tribe argues in its response to the State's motion to recall the *Ute Indian Tribe* mandate that *Hagen* did not address those lands, and so the *Ute Indian Tribe* ruling should be left intact with regard to the national forest lands.

In its principal brief, the State discussed why *Hagen* did in fact address the national forest lands. State Brief at 32-35. Although the District Court had originally concluded that Congress intended that the 1905 Act strip the lands of reservation status when they were added to the National Forest, 521 F. Supp. at 1136-1141, the *Ute Indian Tribe* court concluded that *because the exterior boundaries of the Uintah Reservation remained intact,* the national forest lands were still Indian country. 773 F. 2d at 1099-1100. With the elimination of the historic boundaries, the national forest lands cannot be considered to be "within the limits" of a reservation, and are thus not Indian country under 18 U.S.C. § 1151(a).

The United States argues that *Hagen* is not in tension with *Ute Indian Tribe*'s decision concerning the national forest. United States Brief at 14. This argument is incorrect. *Ute Indian Tribe* held that the forest lands remained Indian country because the exterior boundaries

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ing trust lands were Indian country under § 1151(a) and (c). United States Brief at 15. There is nothing inconsistent between this argument and the State's position concerning former allotments. Existing trust allotments are Indian country under § 1151(c), but under that statute they lose that status once Indian title is extinguished.

[9] Act of March 3, 1905, 33 Stat. 1069.

remained intact. *Hagen* removed those boundaries.[10] The United States' position on this issue is simply untenable. This remains true even if the District Court's analysis is followed. The boundaries shrank—were diminished—to the remaining tribal and allotted lands. These boundaries, of course, did not include the national forest lands, which thus cannot be considered Indian country under § 1151(a).

The same considerations that compel the recall of the mandate with regard to the rest of the Uintah Reservation and the Uncompahgre apply to the national forest lands. Jurisdictional disputes, whether over hunting and fishing, mineral extraction, or criminal matters, will continue to arise on these lands, whether or not the State remains bound by *Ute Indian Tribe*. The lands in question are vast in size, and of significant public interest and importance, justifying a full consideration of the jurisdictional issues in light of *Hagen*. As with the other lands, the Tribe is seeking a permanent injunction against any future exercise of state jurisdiction, a drastic remedy that requires application of current law, not application of a case that has been "effectively overruled."

F. *The Issues of Subsurface Estates, Dependent Indian Communities, and Townsites Are Not Before the Court.*

At pages 46-50 of its brief, the Tribe contends that its' alleged ownership of certain subsurface estates and townsite common areas within the former Uintah Reservation boundaries entitles it to assert jurisdiction over those areas. The Tribe similarly claims that certain towns and neighborhoods within the Uintah Basin are "dependent Indian communities" and thus Indian country under 18

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[10] The United States told the District Court, in this very same injunction proceeding: "[T]he Utah Supreme Court held in *State v. Perank* . . . that the exterior boundaries of the Uintah and Ouray Indian reservation have been disestablished."

U.S.C. § 1151(b). Whatever the merits of these claims, they are not before the Court of Appeals. In the pre-trial order executed in the District Court, the Tribe stipulated that such issues would be deferred for later consideration, and the District Court did not rule upon them. Indeed, the State does not believe that these issues are even properly before the District Court, since the complaint filed by the Tribe in the District Court addresses only the external reservation boundaries, and raises none of these issues. In any event, the Court of Appeals need not consider these issues now.

IV.

THE COURT OF APPEALS SHOULD HOLD THAT THE FORMER UNCOMPAHGRE RESERVATION HAS BEEN DISESTABLISHED

A. *The Tribe Has Made No Substantive Arguments Supporting the Continued Existence of the Uncompahgre.*

In addition to the claims of the parties concerning the Uintah reservation, the State has asked the Court of Appeals to withdraw its *Ute Indian Tribe* mandate as it concerns the former Uncompahgre Reservation. Although neither *Perank* nor *Hagen* explicitly dealt with the Uncompahgre, the Supreme Court's reasoning in *Hagen* destroys any remaining viability that the *Ute Indian Tribe* might have had with regard to the Uncompahgre.

In its response to the State's motion to recall the mandate, the Tribe makes *no* substantive arguments concerning the continued existence of the Uncompahgre. Rather, it argues that *Hagen* did not specifically undermine *Ute Indian Tribe* with regard to *Hagen*, and that considerations of finality should lead the Court of Appeals to leave its prior ruling undisturbed. Ute Tribe Memorandum In Opposition to Appellants' Motion to Recall Mandate at 13-14.

The Tribe is incorrect on both counts. First, the Court of Appeals' decision concerning the Uncompahgre in *Ute Indian Tribe* was wholly based upon the premise that *Solem* had changed the law, so that language restoring reservation lands to the public domain was insufficient to indicate congressional intent to disestablish. *See Ute Indian Tribe*, 773 F.2d at 1095 ("Ultimately, I interpret *Solem* to hold that "public domain" language standing alone is insufficient to support a finding of explicit congressional intent to disestablish"). The *Hagen* court expressly rejected this reasoning. 114 S. Ct. at 967 ("the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation").

Aside from the now-rejected *Solem* analysis, there is no legal basis for a finding that the Uncompahgre still exists, and the Tribe has failed to provide one. The State's principal brief cites the succinct analysis of the United States in a brief filed in *Andrus v. Utah*, 446 U.S. 500, 100 S.Ct. 1803, 64 L.Ed. 458 (1980) that there could be no reasonable conclusion—even in light of the United States' trust responsibilities to the Tribe—except that the Uncompahgre no longer exists.[11] In its brief as amicus curiae before this Court, the United States has reiterated its prior position that the Uncompahgre was disestablished in 1897. United States Brief at 18-19.

The Ute Tribe would permanently and prospectively enjoin the State from legitimate exercises of jurisdiction in a vast area, unpopulated by Indians and containing virtually no Indian lands, on the basis of a decision dis-

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[11] The State wishes to draw the attention of the Court to a typographic error in the portion of its principal brief dealing with the Uncompahgre. At pp. 36-37, the State quotes the United States' statement in proceedings on certiorari from the *Ute Indian Tribe* decision. The quotation as it appears in the brief states that the 1897 Act [Act of June 7, 1897, 30 Stat. 62] established the Uncompahgre. In fact, the United States stated that the 1897 Act *disestablished* the Uncompahgre. *See* Aplt. App. Tab R, pp.316-319.

puted by the United States, "effectively overruled" by the U.S. Supreme Court, and not even defended by the Tribe on a substantive basis. This Court should not perpetuate an erroneous decision any longer. It should withdraw its mandate concerning the Uncompahgre, and affirm the disestablishment of that reservation.

DATED this 4th day of September, 1996.

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